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# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the  
Kamehameha Schools/Bishop Estate,  
*Appellees.*

JURISDICTIONAL STATEMENT OR  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT FILED BY PORTLOCK COMMUNITY  
ASSOCIATION (MAUNALUA BEACH); KOKOHEAD  
COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY  
COMMUNITY ASSOCIATION INC.

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COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE  
CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION;  
WAIALAE IKI COMMUNITY ASSOCIATION; WAI'AU COMMUNITY  
ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.;  
KAHALA COMMUNITY FEE PURCHASE FUND and  
HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,  
*Intervenors-Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the  
Kamehameha Schools/Bishop Estate,  
*Plaintiffs-Appellees.*



## QUESTIONS PRESENTED

1. Whether Hawaii's Land Reform Act, providing for the condemnation of lessor's leased fee interests in land held in concentrated ownership under long term leases, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

(The decision below holding the Act unconstitutional is contrary to *Berman v. Parker*, 348 U.S. 26 (1954) and in conflict with the decision of the Court of Appeals for the Third Circuit in *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), cert. denied, 329 U.S. 772 (1946)).

2. Whether the court below erred in failing to give the findings of the Hawaii Legislature the appropriate weight and deference due from a federal court.

(The decision below conflicts with the holdings of this Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *Clark v. Nash*, 198 U.S. 361 (1905)).

3. Whether the Court of Appeals should have abstained from deciding the constitutional question pending resolution of contemporaneous proceedings in Hawaii courts.

(The decision below refusing to abstain conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975)).

## PARTIES (Rule 21.1(b))

The parties filing this statement are homeowner-lessees, intervenors on the side of defendants in the District Court. Names of all the parties are set forth in the caption. The associations or corporations which are parties do not have parents, subsidiaries or affiliates. Members of interested parties include several thousand homeowners in Hawaii.

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OCTOBER TERM, 1983

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI,  
WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA,  
ANDREW I. T. CHANG, and DAVID SLIPHER, Commissioners of the  
Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive  
Director of the Hawaii Housing Authority; and  
HAWAII HOUSING AUTHORITY

*Defendants-Appellants,*

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS  
LANSDALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES  
COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I;  
PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY  
ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY  
ASSOCIATION, INC.; HAHAHIONE VALLEY COMMUNITY ASSOCIATION,  
INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA  
COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE  
CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION;  
WAIALAE IKI COMMUNITY ASSOCIATION; WAI'AU COMMUNITY  
ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.;  
KAHALA COMMUNITY FEE PURCHASE FUND and  
HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

*Intervenors-Appellants,*

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COMMUNITY ASSOCIATION INC.,  
INTERVENORS-APPELLANTS



Petitioner-intervenors Portlock Community Association (Maunalua Beach); Koko Head Community Lease Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc. respectfully file this Jurisdictional Statement to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 28, 1983.

### OPINIONS BELOW

Concentration of land ownership in Hawaii has been maintained by leasing, instead of selling homesites. The Hawaii Land Reform Act remedies this situation by providing for the condemnation by the Hawaii Housing Authority of the lessor's leased fee interests. The decisions below dealt with the statute as follows:

*Midkiff v. Tom*, 471 F.Supp. 871 (D. Hawaii 1979), Appendix C, held that mandatory arbitration provisions of the Hawaii Land Reform Act to determine just compensation to the lessors for their reversionary interest were unconstitutional and enjoined their enforcement. The opinion raised a serious question as to the method of evaluating the lessor's interests. (These provisions were subsequently deleted from the statute). The decision in this opinion was not appealed, but the opinion contains some of the legislative history of the statute and recites most of the relevant positions of the statutes involved.

*Midkiff v. Tom*, 483 F.Supp. 62 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), Appendix B, a further proceeding in the same action, held that the remaining provisions of the Land Reform Act of the State of Hawaii providing for the condemnation of the lessors' interests were constitutional on their face and that the plaintiffs could not have an evidentiary hearing to show that the legislative premises for the statute were wrong. Judgment pursuant to this opinion resulted in the instant appeal.

*Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), Appendix A, held that, despite pending state actions, the federal courts should not abstain from deciding the constitutional issue and that, on the merits, the Hawaii Land Reform Act was unconstitutional. There was a strong dissent on both issues. While the decision of the court held the statute unconstitutional on its face, the essential concurring opinion found the statute unconstitutional upon the "evidence of record."

These opinions are in the Appendix to this petition.

### JURISDICTION

Jurisdiction in the District Court was grounded on 28 U.S.C. § 1331 (Supp. IV 1980) (federal question), 28 U.S.C. § 1343 (Supp. IV 1980) (civil rights), 28 U.S.C. § 2201 (Supp. IV 1980) (declaratory relief), and 42 U.S.C. § 1983 (Supp. IV 1980) (civil rights, color of state law).

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 28, 1983.

Petitions for rehearing and suggestions for rehearing en banc were filed by defendants and intervenors, appellees, in the Court of Appeals on or before April 11, 1983, and were all denied on June 17, 1983. These intervenor-appellants filed a Notice of Appeal on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1976).

Jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(2) (1976) inasmuch as the Hawaii Land Reform Act was held to be invalid as repugnant to the Constitution of the United States. Your petitioners have designated this statement as petition for certiorari in the



alternative to invoke jurisdiction under 28 U.S.C. § 1254(1) (1976) because they are uncertain as to whether they can raise questions of scope of review and abstention by appeal. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975).

### **STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides in pertinent part as follows: "nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V, cl. 4, 5.

The Fourteenth Amendment, Section One, to the Constitution of the United States provides in pertinent part as follows: "nor shall any state deprive any person of . . . property, without due process of law; . . ." U.S. Const. amend. XIV, § 1.

The Hawaii Land Reform Act is set forth in 1967 Hawaii Sess. Laws Act 307 as amended by 1968 Hawaii Sess. Laws Act 46, 1969 Hawaii Sess. Laws Act 203, 1971 Hawaii Sess. Laws Act 215, 1975 Hawaii Sess. Laws Acts 184, 185, 186; 1976 Hawaii Sess. Laws Act 242, and 1978 Hawaii Sess. Laws Act 140. They are set forth in Hawaii Rev. Stat. ch. 516 (1976).

The provisions of the Hawaii Land Reform Act setting forth its economic and social background are lengthy. Among other things, the legislature found that land ownership in Hawaii is concentrated in the hands of a few. Pertinent text of 1967 Hawaii Sess. Laws Act 307, and 1975 Hawaii Sess. Laws Acts 184, 185 and 186 are set forth as Appendices D, E, F and G.

## STATEMENT OF THE CASE

The Trustees of the Estate of Bernice Pauahi Bishop<sup>1</sup> filed suit in the District Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act was unconstitutional. The Act allows the State in the exercise of its police power, to use the power of eminent domain to condemn the lessor's leased fee interest in residential land and then to sell these interests to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of the Act.

In Hawaii a few landowners including the Bishop Estate own large tracts of residential land. The Legislature found that at least three-fourths of all privately held land in Hawaii was currently owned by this small group. On Oahu alone, twenty-two major private landowners own 72.5% of all land. It has been the policy of these landowners to offer long-term leases to individual lessees rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of land holding as injurious to the well-being of the people of Hawaii, and adopted the Land Reform Act to provide for condemnation of the leased fee interests. Appendix 115-16, 133.

The Hawaii Legislature found that the system of land holding had adverse economic and non-economic effects

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<sup>1</sup>In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls of native Hawaiian descent, known as the Kamehameha Schools.

on the people as a whole including a serious shortage of fee simple residential land; artificial inflation of residential land values; the deprivation of a choice to own or take a lease of land on which homes are situated; and the evils of a continuing inflationary trend of residential land. Appendix 116-17. The Legislature determined that these facts vitally affected the economy and the public health and welfare. Appendix 118. By 1975 the Legislature found that the system was adversely affecting elderly residential leaseholders who were losing their homes. Appendix 135. In particular, petitioners herein refer to findings of the Legislature that lease rentals increased on renegotiation from 400% to 1,000%, and that renegotiation rental at times exceeded mortgage payments. In 1975, the number of outstanding residential leases had increased by more than 10,000 since the passage of the 1967 Act. Appendix 134, 154.<sup>2</sup>

The Legislature found that even after the passage of the 1967 Act, the major private landowners continued to act just as they had before the passage of the Act. By 1973 long-term leaseholds constituted 32% of all owner-occupied housing, more than double the percentage in 1960. Appendix 133. Accordingly, in 1975 the Act was strengthened. Appendix E, F and G.

The history of the Hawaii Land Reform Act is remarkable in that it shows a continuing effort of the Legislature over a period of eight years to deal with a unique problem. Over this period of time it reaffirmed its original findings of concentration and abuse of power and their harmful effects on the economy. Appendix 151-54.

In the instant case, state court proceedings were pending before any proceedings of substance on the merits had

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<sup>2</sup>See Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 Hawaii B. J. 5, 5-9, 13. (1971); Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B. J. 31 (1969).

taken place in federal court. State administrative proceedings preceded the plaintiffs' filing of their complaint herein in Federal District Court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, which were later enjoined by the Federal District Court. Meanwhile in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii 1st Cir., June 29, 1978) (on a complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum (now Chief Justice Lum) issued extensive findings of fact and upheld the constitutionality of lease renegotiation provisions of the Hawaii Land Reform Act. Appendix 48 *et seq*, Appendix K.

Having lost on the constitutionality issue in the state court, the plaintiffs in the instant case file their complaint in federal court on February 28, 1979. Condemnation suits were continuously pending in the state courts from before the date the District Court heard the defendants' and intervenors' motions for summary judgment until after the Court of Appeals took the instant appeal under submission. 702 F.2d 788, 811. Appendix A, A-49.

The issue of whether the District Court should have abstained was raised in the District Court. 702 F.2d 788, 789 n.1. Appendix A, A-2.<sup>3</sup> Before the Court of Appeals,

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<sup>3</sup>Defendants' and intervenors' answers specifically pled abstention as defenses. Docket Nos. 20, 35, 36 in the District Court.

defendants and intervenors urged abstention, Docket entries of October 30, November 3, and December 10, 1981, and March 29, 1982. At the time of the Court of Appeals Decision there were thirty similar condemnation cases in Hawaii scheduled for trial. On November 10, 1982 the Supreme Court of the State of Hawaii had held in similar cases that a trial was necessary to determine the constitutionality under both the Hawaii and Federal constitutions of the Hawaii Land Reform Act. Such a trial did commence in another similar case to which plaintiffs herein were parties on March 14, 1983. After the March 28, 1983 judgment of the Court of Appeals, Chief Justice Lum as Acting Administrative Head of the Judiciary of the State of Hawaii filed an amicus curiae brief opposing the issuance of an injunction against the State proceedings. Appendix L.

#### **REASONS FOR PLENARY CONSIDERATION**

- 1. The Decision of the Court of Appeals Holding the Hawaii Land Reform Act Unconstitutional Under the United States Constitution Is in Conflict With Decisions of This Court**

The court below erred in failing to recognize that the state's power of eminent domain can validly be exercised in aid of the police power; that if a particular result can be achieved under the police power, it makes no difference that the power of eminent domain is used to achieve that result. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 against a challenge that there was an unconstitutional taking because the plaintiffs' property would be taken and redeveloped for private, not public, use. The court noted that the power of Congress over the District of Columbia was the same as the legis-



lative powers of a state. *Berman*, 348 U.S. at 31-32. Writing for a unanimous court Justice Douglas stated:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, see *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, or the States legislating concerning local affairs. See *Olsen v. State of Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; *Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; *California State Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162; *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843.

348 U.S. at 32

and

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent do-

main is clear. For the power of eminent domain is merely the means to the end. See *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-530, 14 S.Ct. 891, 892, 38 L.Ed. 808; *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 679, 16 S.Ct. 427, 429, 40 L.Ed. 576. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33.

The court below erred in not following the holding in *Berman*. It expressly limited the power of eminent domain to five situations, none of which included the exercise of the police power. 702 F.2d at 793-96. Appendix A, A-12 to A-17. Then it held that *Berman* "does not paint with so broad a brush" as to permit a legislature to implement its police powers by the exercise of the power of eminent domain. 702 F.2d at 796. Appendix A, A-18. It is impossible to reconcile the holding of the court below with the holding and language in *Berman*.<sup>4</sup>

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<sup>4</sup>Substantially all the commentators agree that *Berman* holds as we assert: B. Ackerman, *Private Property and the Constitution*, 190, 190 n.5 (1977); J. Gelin & D. Miller, *The Federal Law of Eminent Domain*, 15-16 (1st ed. 1982); I. Levey, *Condemnation in U.S.A.*, 214, 214 n.51 (1st ed. 1969); I. J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 3.11[1] n.21 (rev. 3d ed. 1981); W. Stoebe, *Nontrespassory Takings in Eminent Domain*, 14-15, 15 n.48, 31, 31 n.35 (1st ed. 1977); Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 *Law & Contemp. Probs.*, Spring 1979, at 5, 50; Costonis, "Fair" Compensa-

Prior decisions of this Court make clear that in the exercise of its police power the Hawaii Legislature could have remedied the concentration of fee simple ownership of residential lands in Hawaii by requiring complete divestiture of such interests. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) this court upheld the exercise of the power of divestiture on behalf of a state. In *Exxon* a Maryland statute provided among other things that producers and refiners would no longer be permitted to operate retail service stations within the state and that their ownership in such stations would, in effect, have to be divested. A Maryland trial court held that the statute violated the due process clause of the Constitution of the United States. The Court of Appeals for Maryland held the statute valid under both the due process clause and the commerce clause of the Constitution. On appeal to this Court the judgment of the Court of Appeals of Maryland was affirmed on both grounds. Of the eight participating justices, Justice Blackmun dissented on the sole ground that the Maryland statute was an impermissible discrimination against interstate commerce. Before the Supreme Court, only one of the seven oil companies (and its subsidiary) even contested the due process ruling. Justice Stephens, speaking for the court, stated:

Appellants' substantive due process argument requires little discussion. [footnote omitted] The evidence presented by the refiners may cast some doubt

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*tion and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Colum. L. Rev. 1021, 1036-37 (1975); Lashly, *The Case of Berman v. Parker: Public Housing and Urban Redevelopment*, 41 A.B.A. J. 501-03 (1955); Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A. J. 355-59 (1966); Editorial Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 Geo. Wash. L. Rev. 730, 730-31, 734 (1955); 40 Iowa L. Rev. 659-63 (1955); 53 Mich. L. Rev. 883-85 (1955); Annot., 44 A.L.R. 2d 1414, 1422, 1433 (1955).



on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'. . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (citation omitted). Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, this argument rests simply on an evaluation of the economic wisdom of the statute, 279 Md., at 428, 370 A.2d, at 1112, and cannot override "the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212. [footnote omitted] Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim.

437 U.S. at 124-25.

The opinion further stated:

It is worth noting that divestiture is by no means a novel method of economic regulation, and is found in both federal and state statutes. To date, the courts have had little difficulty sustaining such statutes against a substantive due process attack. See, e.g.,

*Paramount Pictures, Inc. v. Langer*, 23 F.Supp. 890 (ND 1938), dismissed as moot, 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025; see generally Comment, Gasoline Marketing Practices and "Meeting Competition" under the Robinson-Patman Act, 37 Md. L.Rev. 323, 329 n.44 (1977).

437 U.S. at 124, n.13.

This Court's holding in *Exxon* reiterated a similar holding with respect to Congress' exercise of the commerce power. In *North American Co. v. Securities and Exchange Com'n*, 327 U.S. 686 (1946), this Court held that in the exercise of the commerce power, Congress could order a public utility holding company to divest itself of its subsidiaries even though its holdings had been acquired prior to the passage of the Public Utility Holding Company Act.

Thus, the Hawaii Legislature had the power to deal with the evils of economic concentration of landownership in a way which would eliminate the evil. Condemnation of the interests and distribution to the tenants as provided by the Legislature would atomize the concentration. In fact, it is the only conceivable way to increase the market for fee simple homes. Neither the opinion of the court below nor the concurring opinion recognizes the evils of concentration, nor does either propose another solution. To affirm the decision of the Court of Appeals is to hold that Hawaii cannot deal with the problem of economic concentration and that a federal court on the basis of its own knowledge can invalidate state legislation.

## **2. The Decision of the Court of Appeals Is in Conflict With the Decision of the Court of Appeals for the First Circuit**

The opinion of the District Court and the dissenting opinion in the Court of Appeals rely on *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), cert. denied,

329 U.S. 772 (1946). In that case, the legislature passed two statutes providing for the condemnation of private land for four purposes:

(1) for acquisition and disposition to individual squatters for the erection of dwellings;

(2) for acquisition and disposition in larger parcels to individual farmers for subsistence farms;

(3) for acquisition and disposition in larger parcels by lease to expert farmers; and

(4) on the particular island involved, for acquisition and disposition to establish sugar and liquor industries.

Condemnation proceedings were instituted in an Insular Court and the action was properly removed to the District Court of the United States for Puerto Rico. The District Court dismissed the petition for condemnation without the taking of evidence on the ground that the taking was not for a public use and purpose and thus violated rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals reversed. The Court of Appeals first held that the limitations imposed by the Fourteenth Amendment upon the Insular Government were substantially the same as those imposed upon the state governments and that the Insular Government's power of eminent domain was entitled to the same scope as that given to state governments. The court also reasoned that if *any one* of the uses was *not* for a public purpose, the action would have to be dismissed. The court did not approach the question of the validity of the statutes from the standpoint of the police power (the decision antedated *Berman*) but in almost the same words as those used by the Court of Appeals in this action, stated the issue as follows: "The argument is made that due process is denied because the purpose for taking the appellees' land is only to sell or

lease it to others for them to use personally instead of use by the general public." *Eastern Sugar Associates*, 156 F.2d at 323.

The Court of Appeals for the First Circuit upheld the validity of the Puerto Rico statutes and stated: "This argument has been advanced several times in the Supreme Court of the United States in cases of this sort and every time it has been rejected." *Eastern Sugar Associates*, 156 F.2d at 323.

The court stated its function as follows:

Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; (*McLean v. Arkansas*, 211 U.S. 539, 547, 29 S.Ct. 206, 53 L.Ed. 315) it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist. *Tanner v. Little*, 240 U.S. 369, 385, 36 S.Ct. 379, 60 L.Ed. 691. And thus, although we cannot substitute our estimate of the extent of the evils aimed at for that of the Insular Legislature, we are required to make some inquiry into the facts with reference to which the Legislature acted.

156 F.2d at 324.

The court took judicial notice of the social and economic conditions in Puerto Rico in light of its experience as a court having appellate powers over the Supreme Court of Puerto Rico.

The opinion of the court below in this case distinguishes *Eastern Sugar Associates* on the ground that Puerto Rico could have remained in possession of the condemned land after condemnation. 702 F.2d at 795. Appendix A, A-16.

This observation is not correct because at least three of the four uses required transfer to private persons and the court expressly stated: "Therefore if any one of those uses, each considered, however, as part of a broad, integrated program of agrarian reform . . . is not public, the petition was properly dismissed." *Eastern Sugar Associates*, 156 F.2d at 321.

### 3. The Court Below Erred in Failing to Defer to the Findings of the Hawaii Legislature

The court below erred in ignoring, in the case of Judge Alarcon's opinion,<sup>2</sup> and reappraising, in the case of Judge Poole's concurring opinion, discussed below, the extensive legislative findings made by the Hawaii state legislature in enacting the Land Reform Act. These findings included determinations that lessors, in renegotiating the initially generally affordable lease rents, adopted a practice of increasing land rentals in a manner unrelated to the value of the raw land; that these renegotiations brought about staggering increases in annual lease rents, which directly resulted in inflated land values; and that the effect of the leasehold system was found to have grave effects on the health, welfare and well being of elderly persons and to aggravate the already acute need for government sponsored low and middle income and elderly housing. Appendix A-134-35, A-152-55.

In choosing to ignore or reappraise on its own these extensive state legislative findings, the court below failed to accord the findings the deference required by previous decisions of this Court.

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<sup>2</sup>Judge Alarcon's opinion ignores the extensive legislative findings that form the basis of the Land Reform Act by dismissing them as mere "statutory rationalizations. . . ." 702 F.2d at 798, Appendix A-22.

**a. The Court Below Erred in Failing to Give the State Legislative Findings the Weight and Deference Due From a Federal Court**

The opinion of the court below justified its ignoring of the Hawaii legislative findings by holding that such findings are not entitled to the same weight as those of Congress.\* 702 F.2d, 798; Appendix A, A-21. This was clearly error.

The lower court's justification contradicts this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954); there it was held that federal courts must defer to legislatively determined exercises of police power, which includes the exercise of the eminent domain power. In *Berman*, this Court, analogized Congress's exercise of the eminent domain power to that by a state and held that, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 348 U.S. 32.

Each of the cases relied upon by the court below to justify ignoring the state legislative findings was decided prior to the *Berman* decision. Since *Berman* now makes clear that the doctrinal foundation for the exercise of eminent domain is the state's police power, the standard of review of the earlier cases relied upon by the lower court are no longer authority. The proper standard is that noted in the *Berman* decision and reiterated in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978): "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "super-legislature to weight the wisdom of legislation" . . . .'"

Thus, the lower court's failure to accord the proper deference to the state legislative findings was error.

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\*Whatever the proper weight to be given to the state legislative findings, it is clear here that Judge Alarcon's opinion gave those findings absolutely no weight whatsoever, but merely dismissed them as "statutory rationalizations."



**b. The Court Below Erred in Relying on "Evidence" and in Reappraising the Findings of the Hawaii State Legislature**

The pivotal concurring opinion below relied upon certain "evidence of record", 702 F.2d at 805; Appendix A, A-38, and looked to findings of fact in a related case in reappraising the findings of the Hawaii state legislature, 702 F.2d at 806; Appendix A, A-38. This was error for two reasons.

First, the concurring opinion notes that, "In determining public use, the court may consider extrinsic facts and examine the statute as a whole to 'discover the dominant purpose of the taking.'" 702 F.2d at 805 (citation omitted); Appendix A, A-37. However, no evidentiary hearing on the public use issue was ever held since the District Court expressly declined to rely upon any evidence or facts.<sup>7</sup> 483 F. Supp. 62, 65; Appendix A, A-71-72. Thus, assuming that the legislative findings, by themselves, were not sufficient to support a finding of public purpose, a hearing to consider the "extrinsic facts" should have been held.

The concurring opinion's error is made clear by this court's decision in *Clark v. Nash*, 198 U.S. 361 (1905). In that case, on error to the Utah Supreme Court, this Court recognized that a "taking from one person to give to another" might be invalid in most states but that special circumstances peculiar to a state might nevertheless justify the exercise of the condemnation power. This Court noted:

This court has stated that what is a public use may frequently and largely depend upon the facts sur-

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<sup>7</sup>The trial court did note that Hawaii "has an uncommon system of landholding", and that there is a "concentration of land in a few large landholders." 483 F. Supp. 62, 67, 68; Appendix A, A-76-77. However, the trial court made this observation based solely on evidence introduced at a hearing on Plaintiffs' motion for a preliminary injunction, which was not consolidated with a hearing on the merits.

rounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. *Fallbrook Irrig. District v. Bradley*, 164 U.S. 112, 159, 41 L.ed. 369, 388, 17 Sup. Ct. Rep. 56.

198 U.S. at 369.

Since no hearing was held here to determine whether circumstances peculiar to Hawaii may support the Land Reform Act, the court should not have rendered a decision on whether a sufficient public purpose existed.

Second, the concurring opinion referred to certain findings of fact in the related case of *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii 1st Cir., June 29, 1978), *vacated as moot*, No. 7294 (Hawaii Supreme Court, April 14, 1982) Appendix K, in reappraising the state legislative findings. 702 F.2d at 806; Appendix A, A-38.

Such reappraisal of the state's legislatively determined support for the exercise of police power was improper. As noted above, it is the province of the state legislature to make such determinations and, once made, the federal courts are not "to sit as a 'super legislature to weigh the wisdom of legislation.' . . ." *Exxon Corp. v. Governor of Maryland*, *supra*, at 124. No evidentiary hearing on the public use issue was held below since the trial court gave the proper deference to the legislative findings. 483 F.Supp. 62, 65; Appendix A, A-71-72. Thus, no inquiry whatsoever, much less one utilizing the appropriate minimal scrutiny

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\*Cf. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), holding that even under the pre-Berman test, Congress' determination of "public use" is entitled to deference until it is shown to involve an impossibility."



required by this Court, was ever made into these legislative findings. At the very least, some kind of hearing must be held, at which the minimal scrutiny called for by this Court's decision occurs, before the lower court could re-appraise the legislative findings.\*

#### 4. The Federal Courts Should Abstain Pending Review by the Supreme Court of Hawaii

The dissenting opinion in the court below is sufficient to show that generally federal courts should abstain in eminent domain cases such as this. There are "special circumstances" in this case, however, requiring abstention under even the most narrow application of the doctrine of abstention. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, (1968) (Concurring opinion).

A holding that the Hawaii Land Reform Act is constitutional on its face and that an evidentiary hearing is unnecessary does not require abstention. But in the instant case the Hawaii Supreme Court on November 10, 1982, in two companion cases set aside two trial court summary

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\*In this regard, the Hawaii Supreme Court recently refused to determine the constitutionality of this same Land Reform Act on motions for summary judgment and ordered a full hearing into the state and federal constitutionality of the act. *Hawaii Housing Authority v. Castle*, 65 Haw. \_\_\_\_\_, 653 P.2d 781 (1982); Appendix I, A-166; and *Hawaii Housing Authority v. Brown*, Civ. No. 8489 (Hawaii S. Ct., 1982), Appendix H, A-163. Such an extensive evidentiary hearing was recently held in a related case involving Appellees herein (Civ. No. 84308, [First Circuit Court, Hawaii]), and the state judge has orally ruled that the statute is constitutional. He will shortly be issuing extensive findings of fact and conclusions of law, which are most certainly to be appealed to the Hawaii Supreme Court. Thus, a state court determination of the application and meaning of the statute, and a determination of whether the statute can survive what may be a more exacting scrutiny than a federal court can impose, will shortly be handed down.

judgments upholding the constitutionality (state and federal) of the Act and remanded for trial on the issue of public use. Appendix H, I. It is academic to argue which proceedings were pending and which the Bishop Estate had settled during their progress in the state courts. There were certainly actual administrative and court proceedings extant at all times.<sup>10</sup> See *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Wise judicial administration, conservation of judicial resources, and avoidance of duplicative litigation would suggest that the federal courts await the results of the hearing in the state court and review by the Hawaii Supreme Court to decide the constitutionality issue. *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has stated that it is "strongly inclined" to follow judgments of state courts to uphold eminent domain statutes and that state legislatures and courts are more familiar with facts relating to public use. *Clark v. Nash*, 198 U.S. 361, 368 (1905).

Abstention is appropriate because of the compelling public interest of the State of Hawaii in this litigation. *Younger v. Harris*, 401 U.S. 37 (1971). The Court of Appeals for the Seventh Circuit held it was proper to abstain in a condemnation case even though the condemnee claimed that the ordinance violated the Fifth and Fourteenth Amendments to the United States Constitution. *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). That court stated:

This respect and concern [for state court proceedings] arises clearly in relation to a state's eminent domain system. In *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.

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<sup>10</sup>After the decision of the Court of Appeals herein, the Bishop Estate sought unsuccessfully to enjoin a pending trial on the constitutionality issue. Appendix 179.

2d 1058 (1959), the Supreme Court noted the "sensitive nature" of federal court intervention in a state's eminent domain system, remarking that eminent domain was "intimately involved with state prerogative." *Id.* at 28-29, 79 S.Ct. 1070. Several federal courts have opined that state eminent domain proceedings should not be interfered with by federal courts because their local nature makes interference unwise.

528 F.2d at 198

and

The presence of a federal constitutional claim in the federal court action does not preclude that court's staying its hand because, as this court and others have repeatedly stated in the past, "we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it." *Cousins v. Wigoda*, 463 F.2d 603, 607 (7th Cir. 1972). See also *Harrison-Halsted Community Group v. Housing and Home Finance Agency*, *supra*, at 106; *Georgia v. City of Chattanooga*, *supra*, 264 U.S. at 483-84, 44 S.Ct. 369; *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 518, 75 S.Ct. 452, 99 L.Ed. 600 (1955).

528 F.2d at 198.

The court below pointed out the conflict between the Ninth Circuit and the Seventh Circuit as to whether *Younger* abstention should apply in eminent domain and land use cases and that this Court has not addressed the issue. *Midkiff*, 702 F.2d at 801-02 (Concurring opinion).<sup>11</sup> Appendix

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<sup>11</sup>A related, but different question is whether federal courts should abstain in eminent domain actions founded on diversity of citizenship; See, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) and *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

A, A-27 to A-30. Inasmuch as due process issues arise in almost every condemnation and land use case it is important that this issue be resolved by this Court. *See*, Ryckman Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 Calif. L. Rev. 377, 425 (1981); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859, 870 (1976).

Because the Hawaii Supreme Court had held that there must be a hearing on both federal and state constitutional issues, and because such a hearing was in progress at the time of the decision of the Court below, this case is strikingly similar to *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). There, the District Court upheld what would otherwise have been an illegal trespass on the ground that the defendant, Kaiser Steel, had rights of eminent domain under a New Mexico statute. The Court of Appeals reversed, holding that the statute had no public purpose as required under the New Mexico Constitution, and refused to abstain. *W. S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd*, 391 U.S. 593 (1968). Kaiser's claim for abstention was raised for the first time on rehearing based on a state court action it had filed after the opinion of the Court of Appeals. This Court held that the Court of Appeals erred in refusing to abstain because of the pending state court proceedings which would resolve the issue, ordering the District Court to retain jurisdiction pending expeditious resolution of the state proceedings. The concurring opinion pointed out that the issue was one of vital concern to the state of New Mexico so that there were "special circumstances" justifying abstention.

Thus, the "special circumstances" for abstention are:

1. The compelling economic and social interests of the State of Hawaii;

2. The existing state trial on the constitutional issue;
3. The error of the court below in reappraising of legislative findings; and
4. The need for findings by a state court on public use.

### CONCLUSION

The Hawaii Land Reform Act may well be the most important piece of legislation enacted by the State of Hawaii. This importance and the failure of the court below to follow the decisions of this Court would seem to require plenary consideration.

On the other hand, the importance of the matter involving, as it does, evaluation of local conditions by a state court, suggests that it may be wiser to abstain pending the conclusion of the state proceedings.

Respectfully submitted,

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Appellants*

83-236

No.

Office: Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS,  
CLERK

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the  
Kamehameha Schools/Bishop Estate,  
*Appellees.*

APPENDIX TO JURISDICTIONAL STATEMENT OR  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT FILED BY PORTLOCK COMMUNITY  
ASSOCIATION (MAUNALUA BEACH); KOKOHEAD  
COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY  
COMMUNITY ASSOCIATION INC.

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ASSOCIATION, INC.; HAHAHIONE VALLEY COMMUNITY ASSOCIATION,  
INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA  
COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE  
CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION;  
WAIALAE IKI COMMUNITY ASSOCIATION; WAI'AU COMMUNITY  
ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.;  
KAHALA COMMUNITY FEE PURCHASE FUND and  
HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,  
*-Intervenors-Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the  
Kamehameha Schools/Bishop Estate,  
*Plaintiffs-Appellees.*



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**Appendix A**

Frank E. Midkiff, Richard Lyman, Jr. Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate, Plaintiffs-Appellants,

vs.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority, Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation, Intervenor-Appellees.

No. 80-4368.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Oct. 21, 1981.

Decided March 28, 1983.

Before ALARCON, POOLE and FERGUSON, Circuit  
Judges.

ALARCON, Circuit Judge:

The question presented by this case is whether a state may take real property from a lessor and transfer title in fee simple absolute to a lessee because of a shortage of land for fee simple residential ownership.<sup>1</sup> We hold that such a taking violates the federal constitution.

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<sup>1</sup>Federal district court jurisdiction of the case sub judice is based upon 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) & 2201 (declaratory relief) and 42 U.S.C. § 1983 (civil action for deprivation of rights). The issue of whether the district court should abstain from the exercise of its jurisdiction was raised during the proceedings below. The district court proceeded to the merits and thus implicitly exercised its discretion to decline abstention. See *Midkiff v. Tom*, 483 F.Supp. 62 (D.Haw. 1979).

The general rule is that a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th Cir. 1981). "[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n. 5, 98 S.Ct. 673, 677-678 n. 5, 54 L.Ed.2d 618 (1978). This court will reverse the district court on the issue of abstention only where there has been an abuse of discretion. *Shamrock Dev. Co.*, 656 F.2d at 1385.

There are several bases upon which a federal court may abstain from exercising its jurisdiction. See *International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n*, 614 F.2d

## I

On February 19, 1979, the Trustees of the Kamehameha Schools/Bishop Estate [Bishop Estate] filed a declaratory relief action alleging that the Hawaii Land Reform Act, Hawaii Rev.Stat. ch. 516, was unconstitutional. The Commissioners and the Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority were named as defendants [original defendants and intervenors hereinafter Appellees]. The district court declared that the challenged statute before us was constitutional. *Midkiff v. Tom*, 483 F.Supp. 62, 70 (D.Haw. 1979). This appeal followed.

The Hawaii Land Reform Act permits certain lessees in possession of land in that state to acquire title in fee simple absolute through eminent domain proceedings. This legislation was enacted after a determination by the Hawaii Legislature that land ownership is concentrated in a few persons who have chosen to lease their property rather than to sell it. The legislature found that this practice has resulted in a shortage of fee simple land and an artificial inflation of residential land values in the state.

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206, 211-12 (9th Cir. 1980) [*International Bhd.*]. A federal court may decide to abstain, for example, where a federal constitutional issue could be "mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank McChuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) (citing inter alia *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). This court has held that abstention based upon this doctrine (*Pullman* abstention) is required if three tests are met.

- (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
- (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
- (3) The possibility determinative issue of state law is doubtful.

We must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur. The protection provided by the fifth amendment has been extended to the states by reason of the fourteenth amendment. *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896).

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*Canton v. Spokane School Dist.* # 81, 498 F.2d 840, 845 (9th Cir. 1974) (citing *Pullman*, 312 U.S. at 498-99, 61 S.Ct. at 644-645) (footnote omitted). A state's system of eminent domain "is intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (upholding district court's exercise of discretion resulting in abstention), however, this alone is insufficient to require abstention. *Frank Mashuda Co.*, 360 U.S. at 191-92, 79 S.Ct. at 1064-1065; see *Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5 (1978); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980). It is especially crucial that there be "an uncertain issue of state law." *Id.* at 78. The Hawaii Land Reform Act is perfectly clear as to the key issue of whether the condemnation system set forth in Hawaii Rev.Stat. ch. 516 is for a public use. The statute unambiguously states: "The use of the power to eminent domain [under the Hawaii Land Reform Act] . . . is for a public use and purpose." Hawaii Rev.Stat. § 516-83(a) (12). Moreover, there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use. "Hence, the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional." *Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention by the district court thus would have been inappropriate.

Federal courts may also decline to exercise their jurisdiction where the dispute involves "an essentially local issue arising out of a complicated state regulatory scheme . . . ." *International Bhd.*, 614 F.2d at 211. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Ninth Circuit has limited abstention under this principle (*Burford* abstention) to cases where: (1)

## II

As originally drafted, the Federal Constitution contained no reference to the protection of private property interests. It is quite clear, however, that prior to the founding of this nation, it was well established that the government could not take private property except for the use of the public. Hugo Grotius, one of the first commentators to define eminent domain, articulated a "public advantage" as

the state has concentrated suits involving the local issue in a particular court; and (2) the federal issues are not easily separable from state law issues with which the state courts may have special competence. See *International Bhd.*, 614 F.2d at 211. Hawaii has not concentrated challenges to its condemnation system in any court. The federal issue of whether the takings provided for by the state legislature is for a public use is easily separable from any state law issues especially since the statute is clear. *Burford* abstention is thus inapplicable.

Finally, abstention by a federal district court is appropriate under the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* and its progeny counsel federal court abstention when there is a pending or ongoing state proceeding. *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson*, 643 F.2d 1351, 1352 (9th Cir. 1981), in which the federal claims could be competently adjudicated. See *Moore*, 442 U.S. at 425, 99 S.Ct. at 2378. The Supreme Court recently reiterated that abstention under *Younger* principle is limited to federal cases which "seek to enjoin state judicial proceedings. . . ." *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 185, 70 L.Ed.2d 271 (1981). See *Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5. Plaintiffs in this action have not sought to enjoin any state judicial proceedings. We are informed by counsel on both sides of the abstention issue that, as of the time this action was filed, no condemnation actions had been filed in the state courts. This fact is undisputed. Moreover, even though such suits may now be pending in the state courts, the "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n. 8, 97 S.Ct. 1047, 1051 n. 8, 51 L.Ed.2d 313 (1977) (emphasis added). The district court acted correctly in declining to abstain from the exercise of its jurisdiction.

a necessary prerequisite to a taking by the state.<sup>2</sup> H. Grotius, *De Jure Belli Ac Pacis* 385 (F. Kelly trans. London 1925) (1st ed. Amsterdam 1646). In 1758, E. de Vattel wrote that the exercise of the power of eminent domain had to be for the "public welfare." E. de Vattel, *The Law of Nations*, 96 (C. Fenwick trans. 1916) (1st ed. 1758). S. Pufendorf stated that a government taking must be for the "necessities of the state." *De Jure Naturae et Gentium* 1285 (C. & W. Oldfather trans. London 1934) (1st ed. 1688).

### III

The failure to spell out a precise guarantee for the protection of life, liberty, and property interests in the body of the United States Constitution was deliberate. James Madison, considered by historians to be the Father of the Constitution,<sup>2</sup> explained the reasons for this conscious omission as follows:

My own opinion has always been in favor of a bill of rights . . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others . . . . I have not viewed it in an important light—1. because . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude . . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. be-

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<sup>2</sup>United States Constitutional Sequicentennial Comm'n, *History of the Formation of the Union Under the Constitution* 122 (1941).



cause experience proves the inefficacy of a bill of rights on those occasions when its control is most needed . . .

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 *The Writings of James Madison* 271-72 (G. Hunt ed. 1904).

Madison was, however, keenly mindful of the need to create a form of government which would protect each person's property interests. He stated this concern eloquently at the constitutional convention. "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . ." 2 *The Records of the Federal Convention of 1787* 203-04 (M. Farrand ed. 1911) (footnotes omitted).<sup>2</sup>

In 1787 Madison expressed his views to Thomas Jefferson concerning the need to protect minority rights from the acts of a majority that might seek to remedy unequal property distribution through legislative action:

[N]o society ever did or can consist of [a] . . . homogeneous . . . mass of Citizens. . . . In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. . . . [These distinctions will produce dissention and fac-

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<sup>2</sup>Madison also articulated this concept earlier during the constitutional convention: "The lesson we are to draw . . . is that where majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure." 1 *The Records of the Federal Convention of 1787*, 136 (M. Farrand ed. 1911).

tion.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority.

Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), *reprinted in* 5 The Writings of James Madison 29.

Madison's distrust of government according to the will of a majority of the electorate was based on first hand observation:

In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure . . . . Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In the Federalist papers Madison argued forcefully that a republican form of government was essential to preserve minority rights.

Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .

. . . [Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

. . . . .

. . . [T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests of society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation . . . .

. . . . .

. . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .

. . . . .

. . . [In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the induce-

ments to sacrifice the weaker party or an obnoxious individual. . . .

A republic . . . promises the cure for which we are seeking. . . .

The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).

Alexander Hamilton expressed similar apprehensions for the rights of property owners in his contributions to the Federalist. He wrote: "[A]dditional security to republican government, to liberty, and to property," is to be derived from the adoption of the Constitution. *Id.* No. 85, at 639 (A. Hamilton); and, "[A strong executive is essential] to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice . . . ." *Id.* No. 70, at 522 (A. Hamilton).

Initially, Madison did not publicly support a bill of rights. Prior to the ratification of the Constitution he "opposed all previous alterations as calculated to throw the states into dangerous contentions, and to furnish secret enemies of the Union with an opportunity of promoting its dissolution." Letter from James Madison to George Eve (Jan. 2, 1789), reprinted in 5 Writings of James Madison 319-21 n. 1. Once the Constitution had been ratified by eleven states and "a very great majority of the people of America," he felt that "[c]ircumstances are now changed." *Id.* Madison reversed his position and supported the amendments as "providing additional guards in favor of liberty." *Id.* On June 8, 1789, Madison presented a draft of twelve proposed amendments to the first session of Congress. Stoeckel, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972). Included was the following eminent domain clause: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensa-

tion." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoe-  
 buck, *A General Theory of Eminent Domain*, 47 Wash.L.  
 Rev. 553, 595 (1972).

If we look to the language of the Federal Constitution, and interpret the protection afforded property interests contained therein according to the intent of those who drafted it, it becomes unmistakably clear that the Hawaii Land Reform Act is unconstitutional. As anticipated by Madison, the Hawaii Legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land. The Federal Constitution and the fifth and fourteenth amendments were adopted with the express purpose of invalidating the taking of the private property from one person for the private and exclusive enjoyment by another.

#### IV

We are told by Appellees that court interpretations of the Federal Constitution support the validity of the Hawaii Land Reform Act. Our analysis of the cited cases follows. Although the scope of the power of eminent domain has been only vaguely and inconsistently stated, see Berger, *The Public Use Requirement in Eminent Domain*, 57 Or.L.Rev. 203, 204-05 (1978), there is one instance where there is general agreement that eminent domain must not be used. The sovereign may not take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit. *Missouri Pacific Railway Co.*, 164 U.S. at 417, 17 S.Ct. at 135; B. Schwartz, *A Commentary on the Constitution of the United States, The Rights of Property* (pt. 2) 241 (1965); see also, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798) (Chase, J., seriatum opinion) ("[A] law that takes property from *A*. and gives it to *B*. . . is against all reason and justice . . ."). None of the authorities cited by appellees has declared such an attempt constitutional.

## V

The cases upholding takings for a public use teach us that we must look at each case on an ad hoc basis: "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." *Fallbrook Irrigation District*, 164 U.S. at 159-60, 17 S.Ct. at 63. There are several recurring facts and circumstances, however, that are present in the cases in which appellate courts have found a proper exercise of the power of eminent domain.

Courts have found that a taking has been for a public use where:

A. The taking will result in condemnation of property for an historically accepted public use.

B. The taking will result in a change in the use of the land.

C. The taking will result in a change in possession of the land.

D. The taking will result in a transfer of ownership from a private party to a governmental entity.

E. The taking will result in a de minimis condemnation necessary to facilitate the development of nearby land. None of these facts nor circumstances are present in the Hawaii Land Reform Act.

## A

Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building. See *Berger, supra* at 205. General mill acts allowed any owner of land upon a nonnavigable stream to build and maintain mills for manu-



facturing purposes. See *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20-21, 5 S.Ct. 441, 445-446, 28 L.Ed. 889 (1885). In *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 26 S.Ct. 353, 50 L.Ed. 696 (1906), the plaintiff challenged a general mill act enacted by Massachusetts. The Supreme Court summarily disposed of any general objection to the act on the basis that it constituted a taking for private use violative of the fourteenth amendment and noted that: "Such acts have been in force in Massachusetts ever since an act of 1714. . . . The practice sanctioned by them would seem from the recitals of that act to have been still older." *Id.* at 151, 26 S.Ct. at 354.

The Supreme Court similarly recognized a long-standing tradition of the use of eminent domain for the purpose of building roads in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706, 43 S.Ct. 689, 692, 61 L.Ed. 1186 (1923). In *Rindge*, plaintiffs objected to the taking of its property for two proposed highways that were to be built entirely on its private property. Only one of the roads, the "main road," was to be connected to a public highway and only at one end; the other road, was to branch off the main road. *Id.* at 703, 43 S.Ct. at 691. The Court upheld the condemnation as being for a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706, 43 S.Ct. at 692.

This court found condemnation of private land for road building was a public use in *Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir.1969). The rationale, however, was based upon an analogy to redevelopment cases. See *id.* at 568.

Where the purpose of a taking has been historically deemed to be for the public it will be upheld by the courts.

## B

The taking of private property has been upheld where there is a change in the use of the land. Often the change in the use is obvious and direct. Examples include the con-

demnation of land to build roads where no previous roads exist as in *Rindge*, 262 U.S. at 702-03, 43 S.Ct. at 691 or to build a railroad spur where no previous track exists. *Hairs-ton v. Danville & Western Railway*, 208 U.S. 598, 600-01, 28 S.Ct. 331, 332-333, 52 L.Ed. 637 (1908). Similarly upheld are condemnations for the purpose of developing a power plant, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 236, 60 L.Ed. 507 (1916) or developing a recreational area, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 550, 66 S.Ct. 715, 717, 90 L.Ed. 843 (1946) (condemnation by TVA of private property for transfer to the National Park Service as part of the Great Smokey Mountains National Park); *United States v. 416.81 Acres of Land*, 514 F.2d 627, 629 (7th Cir., 1975) (undeveloped lands condemned for the Indiana Dunes National Lakeshore). Changes in the use of condemned property also may be upheld where the change is of a less direct nature. One such example involves the redevelopment of a community. *E.g.*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (discussed *infra*, § VI(A)).

*Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) is an example of a case that involves both changes of a direct and indirect nature. The major agricultural holdings of a landowner were to be condemned for, inter alia, three purposes which would result in a change in the use of the property: "(1) in small parcels to individual agregados [squatters] for the erection of their dwellings, (2) in somewhat larger parcels to individual farmers for subsistence farms and (3) in large parcels by lease to expert farmers, agronomists, or other qualified persons . . . for the operation of 'proportional-profit' farms . . . ." *Id.* at 319. Thus agricultural land was to be taken in some instances for building residences and in other instances for smaller farms, either upon which an individual could subsist or upon which experts would operate proportional profit farms.

In each of the foregoing cases land was condemned for the purpose of putting it to a different use.

## C

Another factual circumstance common to many constitutional takings is that the party who will possess the land after condemnation is not the same party who possesses it prior to the condemnation. The majority of the cases discussed above include examples of such a transfer of possession. One example of an instance where the possessor was the same before and after condemnation can be found in two cases where the government condemned a reversionary interest it held in leased land. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925) (federal government can properly condemn reversionary interest in land it was leasing for possible military purpose); *United States v. Certain Parcels of Land*, 141 F.Supp. 300, 307 (D.Wyo.1956) (condemnation of reversionary interest in land leased by government upon which government housing had been built is for a public use), *aff'd sub nom. Arp v. United States*, 244 F.2d 571 (10th Cir.), *cert. denied*, 335 U.S. 826, 78 S.Ct. 34, 2 L.Ed.2d 40 (1957). It is important to note, however, that in both of these cases, the government, not a private party, was the beneficiary of the condemnation.

## D

Where the beneficiary of the condemnation is a governmental entity there is a strong indication that the taking is for a public use:

[W]here the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation proposes to take the land is public [when declared to be

so by the legislature], is not so strong as where the government intends to use the land itself.

*United States v. Gettysburg Electric Railway*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896). In two cases where the government was the beneficiary of condemned property, the government was a lessor seeking condemnation of the fee simple interest. In *Old Dominion Land Company* the government leased land for military purposes. 269 U.S. at 63, 46 S.Ct. at 39. When the lessor refused to renew the leases, the government initiated condemnation proceedings after an offer to purchase the land was refused. *Id.* The Court upheld the taking as a public use. *Id.* at 66, 46 S.Ct. at 40. Similarly, in *Certain Parcels of Land*, the government leased land upon which it built and maintained a housing project. 141 F.Supp. at 303. The owners of the land refused to renew the lease and the government sought to condemn the fee simple title. *Id.* The court found acquisition of the fee did not violate the public use limitation in violation of the owners' constitutional rights. *Id.* at 307.

*Eastern Sugar Association*, 156 F.2d at 319, also involved a situation where the government could have remained in possession of the condemned land after condemnation. One of the acts that was challenged permitted the government to purchase lands and establish an organization to plant sugar cane for development of the sugar and liquor industries. *Id.* This was upheld as a taking for a public use. *See id.* at 324.

## E

Finally, courts have upheld the condemnation of land where the taking is de minimis and for the purpose of facilitating the development of nearby land.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), a mining company

sought to condemn land for a right of way. The purpose was to erect an aerial bucket line that would result in the placement of four movable towers on the condemnees' land. *Id.* at 529-30, 26 S.Ct. at 302. The line would transport ore from the mines to the railway station two miles away. *Id.* at 529, 26 S.Ct. at 3021. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), involved an attempt to condemn a portion of a neighbor's land by enlarging a ditch to irrigate the condemnor's arid land to produce crops. *Id.* at 362, 25 S.Ct. at 676. The public use was upheld in both of these cases. In each case, the extent of the taking was minimal. The towers in *Strickley* were not permanent and the condemnor was under an obligation "to move the towers as often as reasonably required by the owners" in order for them to mine their land. 200 U.S. at 530, 26 S.Ct. at 302. *Clark* involved taking only enough land to widen by twelve inches the existing irrigation ditch which measured eighteen inches wide, twelve inches deep. 198 U.S. at 363, 25 S.Ct. at 676-677. Thus, both condemnations involved a minimal taking of land that resulted in an increased productivity of nearby land.

## VI

## A

The thrust of the Appellees contentions concerning the public use issue is that this court's inquiry must be restricted to whether the legislature, in enacting the Hawaii Land Reform Act, was acting within the parameters of its police powers. For example, Appellee Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund assert the following:

*Berman* [348 U.S. at 26, 75 S.Ct. at 98] could not be clearer. If the legislative object is within its authority, the use of eminent domain is permissible, since that power serves simply as a means to the end. It follows that if it is constitutional to pursue an objective by police power regulations, eminent domain may be used.

**Brief for Appellees Kahala Community Association, Inc.  
& Kahala Community Association Fee Purchase Fund at  
23.**

We disagree. *Berman* does not paint with so broad a brush. *Berman* involved the condemnation of buildings in a slum area for the purpose of building a new community. Congress had made a determination that the slum area was harmful to the health, safety, morals, and welfare of the public. *Id.* at 28, 75 S.Ct. at 100. It declared that condemnations for redevelopment pursuant to the redevelopment plan were for a public use. *Id.* at 29, 75 S.Ct. at 100-101. Buildings that were old, decayed, and unsafe were to be razed and replaced by new buildings. New homes, schools, churches, parks, streets and shopping centers were to be built. *See id.* at 34-35, 75 S.Ct. at 103-104. The court focused on the planned condemnations on an area basis rather than on a structure-by-structure basis. *Id.* at 34, 75 S.Ct. at 103. Thus, it was not important whether a single building represented a safety or health hazard or was unsightly. The important fact was "to redesign the whole area so as to eliminate the conditions that cause slums—the over-crowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns." *Id.* This transformation from slum to healthy thriving community represents a change in the use of the land.

By contrast, the Hawaii Land Reform Act will result in no change in use of the property. The property itself is currently used for residential purposes. After condemnation it will be used for residential purposes. Appellees argue that there is a change in use in that the land is now used for investment purposes; subsequent to condemnation it will only be used for residential purposes and the owner of the newly created fee simple land will treat the property differently because he knows he can stay there as long



as he chooses. These alleged changes in use, however, are simply different forms of *private* use.

The redevelopment in *Berman* authorized the transfer to public agencies of land "to be devoted to such public purposes as streets, utilities, recreational facilities, and schools." *Id.* at 30, 75 S.Ct. at 101. The remaining land was to be redeveloped preferably by private enterprise. *Id.* Thus, it was possible that certain property owners would be permitted to repurchase their properties. *Id.* at 34, 75 S.Ct. at 103. The key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, i.e., the redevelopment of the area. In the case before us there is no such intermediate step in which the government holds the property for the accomplishment of a public purpose. The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. *Berman* does not authorize such a scheme. Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings. Nothing in *Berman* would provide, as does the Hawaii Land Reform Act, the lessee of condemned property with greater rights to that property than the owner.

It is against this factual background that we must read its sweeping language: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 33, 75 S.Ct. at 103. The Supreme Court also stated in *Berman* that: "*Subject to specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32, 75 S.Ct. at 102 (emphasis added). We read this language as requiring the judiciary to scrutinize carefully any legislative attempt to take private property so as to determine if it is in violation of any

constitution provision. The fifth amendment is specific: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V; *see also*, cases cited § VI(B) *infra* (role of judiciary in determining public use). To hold, as the district court below did, that the public use limitation is subsumed under a "police power/due process analysis," *Midkiff*, 483 F.Supp. at 67, would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amendment. *See, e.g., Missouri Pacific Railway*, 164 U.S. at 417, 17 S.Ct. at 135. Such a result is untenable. Indeed, the Supreme Court has held that merely because the legislature has the power to regulate private property does not allow it to take that property without just compensation in violation of the fifth amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-393, 62 L.Ed.2d 332 (1979). It follows that because the state legislature has the power to regulate private property does not allow it to take that property for a nonpublic use in violation of the fourteenth amendment.

## B

Appellees citing *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40, also argue that review by this court is limited to the question of whether the determination of the existence of public use by the Hawaiian Legislature, Hawaii Rev.Stat. § 516-83(a)(12)\* "is shown to involve an impossi-

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\*Hawaii Rev.Stat. § 516-83(a)(12) states:

The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose.

(emphasis added).

bility." Appellees direct our attention to the following cases as well: *Berman*, 348 U.S. at 32, 75 S.Ct. at 102 (citing *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718; *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40); *Gettysburg Electric Railway Co.*, 160 U.S. at 680, 16 S.Ct. at 429; *Southern Pacific Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir.1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967). The cases cited by Appellees, however, involved the review of a *congressional* determination that there was a public use, *not* the review of a state legislative determination. In *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718 the Supreme Court stated that review of a congressional public use declaration is not the same as the review of a state legislative determination: "But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, . . . when *Congress* has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.'" (quoting *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40 (emphasis added)). Where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); this matter involves a review, under the fourteenth amendment, of a state legislative determination. This court must properly make the ultimate determination of whether the use is public.

*Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905) cited by one of the appellees for the proposition that courts should pay deference to state legislative determinations, is particularly appropriate here. The Court is explicit: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner,

notwithstanding compensation may be required.' " *Id.* at 252, 25 S.Ct. at 256 (quoting *Tracy v. Elizabethtown, Lexington & Big Sandy Railroad*, 80 Ky. 259, 265 (1882)). Moreover, were Congress to enact a statutory provision that would allow condemnation of *A*'s private property for transfer to *B*, solely for *B*'s private use, this court would necessarily find such action contrary to the fifth amendment whether or not congress declared such proceedings to be for a public purpose. See, e.g., *Colchico v. United States*, 286 F.Supp. 507, 509 (N.D.Cal.1968) (court to review whether federal taking for a public use); *United States v. 23.9129 Acres of Land*, 192 F.Supp. 101, 102 (N.D.Cal.1961) ("This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, or for what is essentially a private purpose." (emphasis added)).

## VII

When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit.

The founders of this nation sought to give constitutional protection to minority rights. They wisely foresaw that attempts would be made by the states to take away the private property rights of the landed minority. Our Federal Constitution and the Bill of Rights were designed to prevent such abuses by the majority. That Constitution now compels us to find that the Hawaii Land Reform Act violates the public use limitation of the fifth and fourteenth amendments. Those provisions of the Hawaii Land Reform Act that provide for the condemnation of certain residential property are facially unconstitutional.

The decision of the district court is **REVERSED** and **REMANDED** for further proceedings consistent with the views expressed in this opinion.

POOLE, Circuit Judge, concurring.

I concur in Judge Alarcon's careful and well-researched opinion and in his conclusion that the Hawaii Land Reform Act violates the Fifth and the Fourteenth Amendments to the Constitution of the United States. I recognize that another member of this court, whose opinion is of value and entitled to thoughtful consideration, expresses a contrary view.

Nonetheless an independent review convinces me that in light of all considerations of logic, of the compelling authority of precedent, and of the Constitution itself, the Hawaii Land Reform Act is unconstitutional. It is my further opinion that the United States District Court properly undertook to decide that issue but reached a manifestly erroneous conclusion in upholding the Act.

But however firm these conclusions may appear to me, I am concerned that we not seem to have, as charged in our brother's scold, "cavalierly" ventured to decide these legal issues; asked the "wrong" questions and gotten "wrong" answers; or foresworn that "judicial modesty" which ought to have warned that we are not in position (as presumably are the Hawaiian legislature and courts) "to judge the effectiveness and constitutionality of any attempt at reform." I therefore think it useful to set forth in calmness and reason such of my own analysis as may indicate why the dissent is mistaken. For it is incorrect that we should have abstained; and it is incorrect that there was not squarely presented to a court of the United States an unavoidable constitutional issue which this court was bound to meet and which, I submit, we now have properly decided.

## I. Abstention.

First of all, we have decided this constitutional issue because it is before us and as a court of the United States we are obligated to hear and decide those issues over which we have jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is that obligation, not pride or immodesty, that makes federal abstention "the exception, not the rule." *Id.* See also *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 376-78 (9th Cir.1982); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 819-21 (9th Cir.), *cert. denied*, ..... U.S. ...., 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). Abstention is only appropriate "in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest" *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-1063, 3 L.Ed.2d 1163 (1959)). Since the decision to abstain involves the district court's discretionary exercise of its equitable powers, it is reviewed under the abuse of discretion standard. *Turf Paradise*, 670 F.2d at 819. It would have been an abuse of discretion had the district court abstained.

### A. *Pullman* Abstention

Four general categories of abstention have been generally recognized. The first, *Pullman* abstention, is appropriate where a federal constitutional issue may be avoided or presented in a different light by resolution of an issue under state law. *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-1245; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Knudsen Corp.*, 676 F.2d at 377. For example, a state court might interpret the provisions of a challenged statute so as to moot the federal constitutional issue raised. See, e.g., *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir.1981), *cert. denied*, 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). Here, how-



ver, as Judge Alarcon points out, the Hawaii Land Reform Act specifically provides that its provisions are intended to serve "a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Therefore, state courts of Hawaii could not interpret the statute to avoid the "public use" issue and hence federal review is not thereby spared.

*Pullman* abstention may also be appropriate where a state court may find that the challenged statute violates the state's own constitution. But such abstention is limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution. See *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840-41 n. 3 (9th Cir.1979); *Pue v. Sillas*, 632 F.2d 74, 80-81 (9th Cir.1980); C Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 462-63 (1978). The Hawaii Constitutional Provision concerning eminent domain imposes the same "public use" standard as required under the Fifth and Fourteenth Amendment due process clauses of the United State Constitution. See Hawaii Const. art. I, § 20<sup>1</sup>; *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Therefore *Pullman* abstention to permit application of this "mirror image" state constitutional provision would not be appropriate.<sup>2</sup> See, e.g., *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976) (abstention not appropriate under state constitutional provisions similar to federal constitution equal protection clause); *Pue v. Sillas*, 632 F.2d at 81.

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<sup>1</sup>Section 20 provides:

Private property shall not be taken or damaged for public use without just compensation.

<sup>2</sup>The dissent implies, but does not endeavor to support, the view that somehow the courts of Hawaii might chance upon a construction of the Land Reform Act under circumstances not relying upon familiar concepts of "public use." Since this is only sheer speculation, it need not detain our thoughts.

## B. *Burford* Abstention

Abstention may also be appropriate under the standards originally set out in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission*, 614 F.2d 206, 212 n. 1 (9th Cir.1980). In considering *Burford* abstention this court has examined whether the state channels into a single court lawsuits challenging the state agency's actions, whether the federal issues are inextricably linked to the state law issues, and whether federal adjudication would interfere with the state's efforts to maintain a consistent policy. See *Knudsen Corp.*, 676 F.2d at 377; *International Brotherhood of Electrical Workers*, 614 F.2d at 211.

Hawaii has not created specialized courts to hear cases arising under the Act and the federal due process issue is not linked to complex state law issues. Moreover, we have recently specifically refused to apply *Burford* abstention to cases involving zoning and land use questions, even though, as appellees suggest, issues regarding land use and regulation are special local concerns. See *International Brotherhood*, 614 F.2d at 211; *Isthmus Landowners Association v. California*, 601 F.2d 1087 (9th Cir.1979) (challenge to coastal zoning regulations); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir.1976) (zoning challenge); *Santa Fe Land Improvement Company v. City of Chula Vista*, 596 F.2d 838 (9th Cir.1979). Thus, *Burford* abstention is not appropriate in this case.<sup>1</sup>

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<sup>1</sup>The principal case upon which appellees rely, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), is generally classified as within *Burford* abstention. See *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-1245. In *Thibodaux* the Court upheld a lower court decision to abstain in an eminent domain action removed to federal court, referring

C. Prudential Abstention—*Colorado River*

The third ground for abstention recognized in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), stems from principles of “wise judicial administration.” 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). A district court may abstain where “exceptional circumstances . . . indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results.” *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir.1979). However, given the “unflagging obligation” of the federal courts to exercise their jurisdiction, the applicability of this doctrine is even more limited than the circumstances normally

to the “special nature” of eminent domain as “intimately involved with sovereign prerogative.” 360 U.S. at 28, 79 S.Ct. at 1073.

Yet *Thibodaux* should not be read as an endorsement of abstention in all proceedings involving eminent domain. On the day it decided *Thibodaux*, the Court held that abstention was not appropriate in another eminent domain case, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). The Court specifically stated that merely because “a case concerns a state’s power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty.” 360 U.S. at 191-92, 79 S.Ct. at 1064.

Although the two opinions are not easily reconciled, see C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4241 at 441 (1978), the Supreme Court has subsequently indicated that the principal significance of *Thibodaux* is its holding that a district court may find it necessary to abstain where the case involves “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.” *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244. In particular, the state law issue in *Thibodaux* was whether a city could exercise the power of eminent domain under Louisiana law—an issue, as *Colorado River* suggests, which transcended the importance of the case itself. Here there is no such independent state law issue.

justifying abstention. *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-1247. Thus in *Colorado River* the Court found that "exceptional circumstances" existed to dismiss the federal action in favor of a pending state action because of the Congressional policy set out in the McCarran Amendment to avoid piecemeal adjudication of water rights—a policy reflected in traditional rules governing the adjudication of property matters, and also because state law had established a single continuous proceeding for the adjudication of Colorado river water disputes. No comparable factors here favor adjudication in state court, and therefore the heavy burden necessary to justify abstention has not been met.

#### D. *Younger* Abstention

A fourth area for abstention is based on the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* held abstention appropriate where the federal claimant sought to restrain on-going state criminal judicial proceedings. The principle has subsequently been extended beyond the criminal context to state proceedings which involve "important state interests." *Middlesex County Ethics Committee v. Garden State Bar Association*, ..... U.S. ...., 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Thus, the Supreme Court has specifically approved abstention to avoid interference with civil contempt proceedings initiated by a state court, *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); attachment proceedings brought by a state to recover welfare payments procured by fraud, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); a custody proceeding in which the state sought to recover custody of abused children, *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); and state disciplinary proceedings for members of the bar, *Middlesex*, 102 S.Ct. at 2523 ("The importance of the state interest in the pending state juris-

diction proceeding \* \* \* calls *Younger* abstention into play"); and *id.* at 2524 ("No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles"). Since the federal claimant could raise the constitutional claims in the state proceedings, the interests of comity and federalism precluded federal interference in the state proceedings. See Hart & Wechsler, *The Federal Courts and the Federal System* 280-82 (Supp. 1981).

Although the Supreme Court has not addressed the issue, in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir.1975), the Seventh Circuit has held that a state's interest in eminent domain proceedings constitutes so important a governmental interest that *Younger* abstention is appropriate. That court reasoned that since the federal constitutional claims could be raised in the ongoing state court proceedings it was appropriate for the federal court to abstain "so as not to interfere with state sovereignty." 528 F.2d at 200.

*Ahrensfeld*, however, relied only in part on *Younger's* abstention doctrine. The court also found that "other circumstances" were present which made *Pullman* abstention appropriate because of an unresolved issue regarding state valuation standards.<sup>4</sup> 528 F.2d at 199-200. But as indicated

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<sup>4</sup>The project involved was the taking for the construction of an Athletic and Convention Center. The federal plaintiffs challenged public purpose and also that such a taking was improper under the applicable Illinois Eminent Domain Act. The court said: "Since 'the state court's interpretation of the [statute] may obviate any need to consider [its] validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.'" 528 F.2d at 200 (citing *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 641, 79 S.Ct. 455, 457, 3 L.Ed.2d 562 (1959), and *Martin v. Creasy*, 360 U.S. 219, 224, 79 S.Ct. 1034, 1037, 3 L.Ed.2d 1186 (1959). (Citations omitted.)

above, *Pullman* abstention is not appropriate here. Also, as already said, this circuit has concluded that a state's interest in land use and regulation does not automatically justify abstention under the *Burford* doctrine, which, like *Younger*, contemplates deference where there is an ongoing state judicial proceeding. See *Middlesex County Ethics Committee, supra*; *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978). Such ongoing action must begin "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975); *Middlesex*, 102 S.Ct. at 2524. Unless such an action is underway the interests expressed in *Younger* of avoiding duplicative litigation and interference with the state judicial system are not applicable. And proceeding in the federal action in such circumstances is not to be regarded as reflecting a lack of confidence in the state court's adjudication of constitutional issues because "the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974).

Appellants in this case filed their district court complaint in February, 1979. At that time the only extant proceedings at the state level were public hearings being conducted by the Hawaii Housing Authority as required under the Hawaii Land Reform Act before instituting condemnation of certain of appellant's residential tracts. See Hawaii Rev.Stat. § 516-22.<sup>5</sup>

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<sup>5</sup>Section 516-22 provides:

*Designation of leased fee interest in all or part of development tract for acquisition.* The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after



The dissent refers to four state court condemnation suits which at various times were pending in the state court. All were settled without trial. Three were terminated before the district court ruled on the summary judgment motions before it. The fourth remained pending after the final judgment was entered here, but it too was settled. The dissent misreads the law in its premise that the mere filing of a

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twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, \* \* \* the authority finds that the acquisition of the leased fee interest in residential house-lots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter.

*Younger* abstention was, as contended by the dissent, not triggered by the Housing Authority hearings provided by the statute since the Supreme Court has indicated that abstention is limited to judicial and not administrative proceedings. See *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 112-13, 102 S.Ct. 177, 184, 70 L.Ed.2d 271 (1981). Cf. *Patsy v. Board of Regents*, . . . U.S. . . . , 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (exhaustion of state administrative remedies not required under section 1983).

In *Middlesex*, 102 S.Ct. at 2522, the Court concluded that the district court properly abstained to prevent interference with disciplinary proceedings of a local District Ethics Committee appointed by the New Jersey Supreme Court. However, there the Court specifically found that under New Jersey law the proceedings were "judicial in nature." In particular, the Court noted that the local committees are considered the arm of the New Jersey Supreme Court and that filing a complaint with the committee "is in effect a filing with the Supreme Court."

In the present case, the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*.

condemnation action would *proprio vigore* bring into play the requirement of abstention. As Justice Brennan stated in *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216 n. 10, 39 L.Ed.2d 505 (1974):

"The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. [Citations omitted.]

In May, 1979, the district court heard appellants' motion for a preliminary injunction. It found that on the merits appellants were unlikely to prevail on their general due process challenge, but that the statute's mandatory arbitration and valuation provisions were facially unconstitutional. Accordingly, the court held that the state administrative condemnation proceedings could proceed but it enjoined the operation of the objectionable arbitration and valuation provisions.<sup>6</sup> The Hawaii Housing Authority did not actually file the first of its eminent domain lawsuits in state court against appellants until September, 1979, shortly after the parties in district court had begun filing motions for summary judgment.

Thus by the time the state proceedings were instituted in this case the federal action was well beyond "the embryonic stage." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975). Under those circumstances abstention was not appropriate. *See id.* (Younger abstention not applicable where district court issued preliminary injunction prior to institution of state criminal action); *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978) (hearing for injunctive relief on plaintiff's likelihood of success qualifies as proceedings of substance on the merits).

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<sup>6</sup>Following the district court's ruling, the Hawaii Legislature amended Section 516 to remove the mandatory arbitration provision and to amend the valuation provisions.

Moreover, it appears that the state attorney general never raised the *Younger* issue at any time before the district court.<sup>7</sup> Although the parties may not waive the applicability of *Pullman* abstention, see e.g., *Santa Fe Land Improvement Co.*, 596 F.2d at 840, the Supreme Court has specifically indicated that the *Younger* doctrine need not be considered if not invoked by the state:

If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.

*Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). Accordingly, in submitting the issue of the statute's constitutionality to the district court in this case, it appears that the Hawaii attorney general effectively waived his claim for *Younger* abstention. See *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 5 (5th Cir.1978), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Evansville Book Mart, Inc. v. City of Indianapolis*, 477 F.Supp. 128, 130 (S.D.Ind.1979); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4252, at 547-48 (1978). We need not, however, rely solely on waiver, for independently it is clear that *Younger* does not apply.

In sum, none of the circumstances recognized by the federal courts as calling for abstention are present here. Therefore the district court did not abuse its discretion in proceeding to decide the constitutional issue before it.

## II. Public Use

The Hawaii Land Reform Act, Part II, authorizes eminent domain proceedings for the purpose of transferring from the fee owners to existing lessees the fee simple title

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<sup>7</sup>In fact, no party addressed the abstention issue until the court raised the subject at oral argument.

to single family residential lots held under long term ground leases. Haw.Rev.Stat. §§ 516-21 through 45. The act applies to residential lots of not more than 2 acres located in development tracts of not less than 5 acres and held under leases for terms of twenty years or more. Haw.Rev.Stat. § 516-1(2), (5), (11).

Condemnation proceedings are actually initiated on petition of lessees desiring to obtain the fee title to their leased property. The statute requires that the application be on behalf of the lessees of 25 lots or 50% of the lots in a development, whichever is less. Haw.Rev.Stat. § 516-22.

While the statute permits the state to appropriate funds and issue bonds for the purpose of implementing the statute, it appears that (except for administrative overhead) the state uses no public monies to acquire property under the statute. The condemnation award and incidental costs of condemnation are paid by the private lessee acquiring a given property. Haw.Rev.Stat. §§ 516-30, -33, -33.5.

Under the statute, the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase. Haw.Rev.Stat. § 516-22. While the Housing Authority is required to find that the acquisition "will effectuate the public purposes" of the statute, it need not find existence of a shortage of fee simple property in the county in which a condemned lot is located. *Compare* 1967 Haw. Sess.Laws, Act 307 § 11 and Haw.Sess.Laws, Act 184 § 2(6) with 1976 Haw.Sess.Laws, Act 242 § 2 and Haw.Rev.Stat. § 516-22.

In addition to the condemnation provisions, the Hawaii statute also provides new safeguards to lessees of residential properties who continue under long term leases. Haw. Rev.Stat., Part III. Rights of Lessees, §§ 516-61 through 70. Among these are rent control and guarantees that such lessees may sell or assign their leasehold interests, and may cure default, this presumably easing the structures of the landlord-tenant rigid relationships.

But no restrictions are placed by the Act on the use or alienation by a lessee-turned feeholder of his property interest. If the new owner elects to let out to a new tenant under a long-term lease, that tenant does not receive protections of Part III. The new feeholder may therefore turn around and sell that property subject to a long-term ground lease in which *he* now holds a reversionary interest, thereby continuing the very cycle and effectively frustrating the avowed purpose of increasing the incidence of fee simple residential properties in Hawaii. Because the property is no longer part of a minimum five-acre tract, the lessee-turned-lessor's property is not subject to disfeasance by operation of the eminent domain scheme under which the former tenant, now a landlord of a long-term lease, acquired the interest. See Haw.Rev.Stat. § 516-1(5). Alternatively, of course, the new feeowner may elect to retain and live on his land as before, or may sell or lease a partial or entire interest therein, just as prior to the taking he and his former landlord had such options according to their respective holdings.

Thus the statute permits, but neither requires nor contemplates, a change in the use of the land. It merely provides a procedure for the involuntary transfer of title in the affected property from the disfavored lessor to the now advantaged lessee. Appellants argue that a condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment. Judge Alarcon agrees, and I concur.

The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

*Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937) (citing *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923); *Cincinnati v. Vester*, 281 U.S. 439, 446, 449, 50 S.Ct. 360, 362, 363, 74 L.Ed. 950 (1930)). In my view, the Hawaii statute accomplishes precisely this invalid result, for if it does not constitute a transfer "for the private use of another," that term can have no meaning.

The legislature has set forth a number of findings in its attempt to clothe with the trappings of "public use" what is no more than a transfer for the private use of another. See e.g., Haw.Rev.Stat. § 516-83. Determining what constitutes a public use for fourteenth amendment due process examination of eminent domain proceedings, however, is a justiciable question ultimately to be determined by the court, and not the legislature. Thus, while a legislative determination of public use is entitled to considerable deference, it is not binding on this court. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 606, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-718, 90 L.Ed. 843 (1946); *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 7.4 (1981).

It is true that "public use" is not synonymous with "use by the public," and that a state may condemn property to be sold or leased to individuals as Judge Alarcon has



explained, citing *inter alia*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896); *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied* 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946). But the private benefit must be an incidental one, and not the dominant purpose of the taking. *Adams v. Housing Authority*, 60 So.2d 663 (Fla.1952); *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla.1975).

[E]minent domain cannot be employed to take private property for a predominantly *private* use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

*Id.* at 455 (footnotes omitted).

In determining public use, the court may consider extrinsic facts and examine the statute as a whole to "discover the dominant purpose of the taking." 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.4[1]. "In short, the constitutional protection against the taking of public property for private use cannot be evaded by any colorable declarations that the use is public however formally and officially made." *Id.*

Upon examination of the statute and the evidence of record, I conclude that the Hawaii Land Reform Act's eminent domain provision cannot be saved as an exercise of police power. It is beyond doubt that legislation need not be wise, nor the best means for fulfilling relevant social and economic objectives. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317, 96 S.Ct. 2562, 2568, 2569, 49 L.Ed.2d 520 (1976); *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). However, when as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists.

The Hawaii Land Reform Act proclaims its purpose to be the alleviation of the shortage of fee simple residential land in Hawaii. Yet, as set forth above (see page 13, lines 23-26), the legislature has amended the statute to delete a requirement that the Housing Authority, to whom is committed the power and decision to take, first find a shortage of fee simple housing in areas in which acquisitions under the statute are to be made.

The legislature has determined that the concentration of residential lands in the hands of a few holders who choose to lease under long term leases has caused shortage and has resulted in an inflation of land values. In fact, the statute itself is so structured that it can only aggravate this shortage and resultant inflation of land values. The Hawaii Circuit Court has found as fact that in late years the large landholders have made residential homesites available, albeit through the traditional leasehold arrangements. *Midkiff v. Amemiya*, Civ.No. 47103 (Haw. 1st Cir.) (Findings of Fact).

But those problems with the Act, while telling of its nature, could not alone condemn it entirely. What does infect it with unconstitutionality is that it authorizes an

agency of the state, upon the application of a tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner. The statute does not accomplish this transformation merely incidentally en route to the effectuation of other, different, presumably more urgent objectives; nor is it that in its unreconstituted form, the present right of freeholding threatens, interferes with, delimits, pollutes or offends against the commonweal. The divestiture is single minded and patent of purpose: it strips the owner of the fee and vests the fee in the tenant. Otherwise, there is not an iota of change. Not a stick, stone, blade of grass, or flake of paint is altered; the use continues precisely as it was before; the awesome mechanism of taking becomes *functus officio* in the instant of its exercise; its only service is to sever ownership from A and bestow the same on B.

Indeed a unique and drastic analogue of "eminent domain" is created by this legislation; but that characterization would not alone be cause to strike it down. Indeed the purported justification is that it responds to a perceived need; but so also have many legislative enactments since December 15, 1791—the ratification date of the "Bill of Rights"—proclaimed their aim to attend outstanding needs, yet failed in passing constitutional muster. The problem which this Act cannot overcome is not its novelty or boldness or philosophical drift or internal deficiencies. The problem is in the bar of the Fifth Amendment which reads in simple words: "[N]or shall private property be taken for public use, without just compensation."

It is not enough that a "just" price be paid when the public (the state) seeks to invade the right of lawful private ownership: the use for which the taking is made must itself be for a public purpose. It is not a public purpose to take the property of one person in order that it may

become the private property of another. It is said that "outsiders" may have a problem "in comprehending the constitutionality" of this legislation. (Dissent, page 808.) A commentator, quoted *in extenso* by the dissent, *id.*, has written that one factor which a reviewing court might consider, "if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail." That writer's thesis is that elsewhere "redistribution of the land" is taken for granted, and that it would be anomalous for "this government" to insist on land reform elsewhere if "its own Constitution prevents similar reforms in the American states."

However interesting a commentary on comparative international polity, that analogy and that rationale are both inapposite in the face of the organic restraints which our Constitution was intended and is held to impose upon governmental authority. We cannot foresee what the future may hold, and unborn generations may yet witness triumph of the right to such "redistribution" of the property of others. But before that Huxleyan advent, there will have to have come some change in Amendment V, with a corresponding disfavor of the principle, known to us not later than Magna Carta, that one's freehold may be taken only "by lawful judgment of his peers, or by the law of the land."<sup>8</sup>

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<sup>8</sup>"No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land. We will not sell, nor deny, nor delay to any man either justice or right." Magna Carta (1225), Cap. XXIX, Pound and Plucknett, *Readings on the History and System of the Common Law*, 3d ed., page 180.

The legislature has found:

Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few land-owners of such land . . .

Haw.Rev.Stat. § 516-83(3).<sup>\*</sup> In fact, however, as the Circuit Court also found, on Oahu, the most populous Island with the most acute housing shortage, "there is only a 10 percent difference in the price between fee simple properties and comparable leasehold properties." *Midkiff v. Amemiya*, *supra* (Findings of Fact). The point is not that housing shortages do not exist in the Islands; it is that shortages of similar kind and degree exist in other of the 50 states, and so do constitutional limitations.

The thrust of the statute, therefore, is not nearly so much the providing of residential housing where it may not reasonably be had; it aims and objectives are to leave the residential supply as it exists, but to shift the fee from present owners to their lessees. And this in fact is all that the statute does.

In the Act before us the state legislature has simply decided that it prefers B's ownership of the land to A's, and the vesting of B with ownership of property heretofore lawfully held by A constitutes the statute's only substantive change. When, as here, the only variable presented is

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<sup>\*</sup>While the legislature finds a shortage of fee simple residential property, it is significant there is a surplus of condominiums on the islands. See *Midkiff v. Amemiya* (Findings of Fact), *supra*.

whether A or B holds title to the land, the public purpose vanishes. See *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. at 80, 57 S.Ct. at 376.<sup>10</sup>

I conclude therefore that the taking authorized by the Hawaii Land Reform Act is not a taking "by the law of the land" and is therefore invalid under the Fifth and Fourteenth Amendments to the Constitution of the United States.

FERGUSON, Circuit Judge, dissenting:

The majority cavalierly decides that the legislature of Hawaii is forbidden by the federal constitution to carry out its program of residential land reform. In so doing, the majority has decided, wrongly, an issue that neither this court nor the district court should have reached in the first place. The majority has substituted its opinion for the careful judgment of the Hawaii state courts, and the Hawaii legislature, in "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Canton v. Spokane School Dist.* # 81, 498 F.2d 840, 845 (9th Cir.1974), citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498, 61 S.Ct. 643, 644, 85 L.Ed. 971 (1941). The majority has interfered with a state legislature's exercise of a power which is "an inherent attribute of sovereignty." *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 P. 78 (1900), and which is "'universally' recognized and 'necessary to the very existence of government.'" *City of Oak-*

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<sup>10</sup>"For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have the power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good." J. Locke, *The Second Treatise of Government (An Essay Concerning the True Original, Extent and End of Civil Government* 138 (J. Gough 3d ed. (1966) at 71)).



*land v. Oakland Raiders, Ltd.*, 32 Cal.3d 60, 64, 183 Cal. Rptr. 673, 646 P.2d 835 (1982). "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied by its fundamental law." *Kohl et al. v. United States*, 91 U.S. 367, 372, 23 L.Ed. 449 (1875). The majority labels the Hawaii legislature's attempt to exercise this fundamental sovereign power a "tyranny of the majority." But "concrete cases are not to be decided by calling names." *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir.1946). My research has disclosed no case supporting the conclusion that the statute here at issue is unconstitutional on its face. To the contrary, precedent and common sense both point quite plainly to the opposite conclusion. I therefore dissent.

One commentator has already anticipated the problem that outsiders would have in comprehending the constitutionality of the Hawaii Land Reform Act:

The almost instinctive feeling that the Hawaii Act is radical may be based to some degree on an emotional reaction rooted in the assumption that since land is easily available on the open market to anyone who wants to buy it, no man should be forced to sell his land to another. This assumption, although valid in most parts of continental United States, is not valid in the island State of Hawaii.

One factor that argues in favor of the Act and may be considered by the Court, if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail. In both Asia and Latin America it is taken for granted that a redistribution of the land must be accomplished as a vital first step in carrying out reforms that will allow democratic governments to be established and survive. Land reform is necessary for the economic, political, and social health and stability of many of these nations.

It would be anomalous and somewhat hypocritical if the United States Government were to insist that land reform be undertaken in other countries when its own Constitution prevented similar reforms in the American States. True, there is a substantial difference between the State of Hawaii and a country like South Vietnam. The most obvious one is the difference between their economies—there are no peasants in Hawaii. But to recognize that difference is not to say that for the long-term political and economic health of Hawaii, land reform here is not as necessary as land reform is to the long-term development of South Vietnam. The existence of a monopoly that can control scarce land resources in Hawaii is dangerous because control of land in an island State represents more than the economic power that the land represents in dollar value.

The state's right to control other types of monopolies is clear; Hawaii's right to control and break up a land monopoly should be at least as clear considering the greater danger such monopoly poses to the political and economic health of an island State.

Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969) [hereinafter cited as *Hawaii's Land Reform Act*].

The majority begins by asking the wrong question. It believes that it "must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit." Maj. op., *ante*, at 790. But the land reform program does not simply transfer land from one owner to another owner for his private use and benefit; it transfers land from a handful of large owners to numerous small owners. Moreover, the "transfer" here can be accomplished only through the intervention of the Hawaii Housing Authority, which

must find that the transfer accomplishes the public purposes of the Land Reform Act. Thus, the majority's analysis begins with a distorted account of what the statute actually does. The real question in this case is not whether a naked transfer of title solely for a person's private use is an unlawful taking. The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage. Having asked the wrong question, the majority predictably arrives at the wrong answer.

## I. COMITY AND FEDERALISM

As I see it, the only questions presented to us by this case are, first, whether the district court should have abstained from deciding it on the merits; and, second, if not, what is the appropriate standard of review to be applied by a federal court in passing upon a facial challenge to a legislature's exercise of the power of eminent domain. The answers to both questions emanate from the joint principles of judicial restraint, comity and federalism, which counsel courts not to interfere unnecessarily with the exercise of legislative functions by substituting their judgment for that of legislatures on primarily legislative functions, and which counsel the federal courts not to interfere unnecessarily with the exercise of fundamental state powers.

Issues concerning land use within a state are not easily made a subject of federal concern. It is an essential attribute of a state's sovereignty to be able to use land to promote the commonweal. That is why a state may take

land for a public use. Whether land is used to promote the common good must invariably depend on facts and circumstances that will vary from state to state.

Abstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case not only because the Land Reform Act is significant to the Hawaiian people, but because the case will now have an unfortunate impact on any future attempt by any state to experiment with land reform, regardless of whatever compelling needs may exist in a particular state. Hawaii faces a very difficult land situation. Judicial modesty should prevent us from thinking that we are in a better position than the Hawaiian legislature and courts to judge the effectiveness and constitutionality of any attempt at reform.

The majority ignores the nature of our federalist compromise. The Constitution could have decided that states are merely administrative organs of the central government, but in fact the Constitution decided otherwise. States have been granted independent law-making power, the purpose of which is to provide their people with public benefits and services. There can be no more basic "benefit" than land.

One advantage often cited in favor of our federal system is that it allows a high degree of free play to the states. "It is one of the happy incidents of the federal system," Justice Brandeis wrote, "that a single courageous state may if its citizens choose serve as a laboratory and try social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

The Hawaii Land Reform Act is an important state experiment. The recognition that control over land is crucial to the existence of "the state as a state" is implicit in federal court decisions abstaining in state eminent domain proceedings. As the majority recognizes, *citing Louisiana*

*Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058 (1959), "a state's eminent domain proceeding is intimately involved with sovereign prerogative." Maj. op., *ante*, at 789, n. 1.

The power of eminent domain is a fundamental sovereign power of the states. Its exercise has always been a legislative function. The majority's decision to declare facially unconstitutional the statute before us is thus an extraordinary exercise of the federal judicial power. I find nothing in the statute so extraordinarily offensive as to call for such an exercise.

## II. ABSTENTION

Abstention is appropriate in this case, basically, because without it the federal courts will be interfering unnecessarily in state judicial processes and judgments. Several more particular reasons for abstention are apparent upon closer examination.

### A. *Younger* Abstention.

*Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, teach that the federal courts ought to abstain from deciding cases which implicate important state interests, when those same issues are the subject of current adjudication in the state courts. Where state criminal proceedings are begun against federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the abstention principles of *Younger* apply in full force. *Hicks v. Miranda*, 422 U.S.332, 349, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975). Today, seventeen years after *Hicks*, the policies underlying *Younger* are fully applicable to non-criminal judicial proceedings when important state interests are involved. *Middlesex County Ethics Committee v. Garden State Bar Association*, ..... U.S. ...., 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). In the

instant case, state court proceedings were pending before any proceedings of substance on the merits had taken place in federal court.

State administrative proceedings preceded the plaintiffs' filing of their complaint herein in federal district court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, a move that was later enjoined by the federal district court. Meanwhile, in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii Ct.App. filed June 29, 1978) (complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum issued extensive findings of fact and upheld the constitutionality of the Hawaii Land Reform Act.

Not until February 28, 1979 did the plaintiffs in the instant case file their complaint in federal court. On November 14, 1979, the district court held a hearing on the initial motion for summary judgment. But by then, three condemnation suits were already pending in the state court. Civ. Nos. 59201, 59202 & 59191. These suits were eventually settled. On April 3, 1980, a subsequent motion for partial summary judgment was heard in the federal district court. However, by then, a fourth condemnation proceeding was pending in the state courts. Civ. No. 60465. On June 10, 1980, the district court issued a final judgment and permanent injunction, *Midkiff v. Tom*, 483 F.Supp. 62 (D.C. Hawaii 1979). The fourth condemnation proceeding, however, was not settled until September 1981.



As of October 18, 1981, the date upon which we heard oral argument in this case, condemnation suits encompassing eighteen of the Trustees' subdivisions were pending in state courts. Thus, condemnation suits were continuously pending in the state courts from *before* the federal district court heard the initial motion for summary judgment until after we took this appeal under submission. It appears that such suits are still pending now.

On November 9, 1981, an interlocutory appeal was taken to the Hawaii Supreme Court on the issue of whether a particular condemnation under the Hawaii Land Reform Act was being done for a public purpose. *Hawaii Housing Authority v. George Li Brown*, Civ. No. 60945, Supreme Ct. No. 8489. In that case, the Hawaii Supreme Court denied lessees' motion to dismiss landowners' attack on the constitutionality of the Hawaii Land Reform Act. In so doing, the court stated, "it appears that the law does not favor the waiver of a claim that a statute is unconstitutional . . . . The constitutional issue in this case is of course an issue of public importance."

Citing both *Younger* and *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the Seventh Circuit held that a district court properly refrained from interfering with pending state court eminent domain proceedings. *Ahrensfield v. Stephens*, 528 F.2d 193 (7th Cir. 1975). Citing also *Louisiana Power & Light Co. v. City of Thibodaux*, *supra*, the court noted the sensitive nature of federal court intervention in a state's eminent domain system. Also cited with approval was *Creel v. City of Atlanta*, 399 F.2d 777, 779 (5th Cir. 1968), which stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation proceeding:

[T]he principal and essential issue is one properly for determination by the state courts. Not only is munic-

ipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding.

*Ahrensfeld, supra*, at 198. The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary.

Since important state interests are involved in the implementation of a state's land use policy, *Younger* abstention is fully applicable here:

The importance of the state interest in the pending state judicial proceeding and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith harassment or some other extraordinary circumstances that would make abstention inappropriate, the federal courts should abstain.

*Middlesex County Ethics Committee v. Garden State Bar Ass'n, supra*, ..... U.S. at ....., 102 S.Ct. at 2523. The constitutional issue in the case before us has been and remains before the Hawaii courts. Clearly the proper route of review for the instant case would have been up the state court ladder and then to the United States Supreme Court.

#### B. *Pullman* Abstention.

Even if there were no ongoing state proceedings requiring abstention under *Younger*, the principles announced in *Pullman, supra*, would call for abstention in this case. The Court in *Pullman* was confronted with an issue which was "more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U.S.

at 498, 61 S.Ct. at 644. The Court observed that adjudication of the constitutional question might be avoided because the case also presented a potentially determinative issue of state law. Under those circumstances, the Court held, the district court ought to abstain from deciding the constitutional issue, as long as it appeared that a definitive ruling on the state issue could be obtained in the state courts "with full protection of the constitutional claim."

*Pullman* abstention is appropriate here, as there may well be an alternative to adjudicating the federal constitutional challenge to the land reform statute. The question concerning the meaning of public use need not be broached if the Hawaii Land Reform Act permits the state to continue to regulate the condemned property in some way to achieve the public goals of alleviating conditions such as inflation and land shortage. Whether the statute permits any continued regulation is a doubtful and possibly determinative issue of state law. By determining the issue on federal grounds, the majority deprives the state of a legitimate opportunity to uphold the land reform program.

Furthermore, there has been no definitive ruling as to whether the statute is constitutional under the Hawaii Constitution, which has its own "public use" requirement. A judgment by the Hawaii Supreme Court that the statute was in conflict either on its face or as applied, with the Hawaii Constitution, would eliminate forever the need for this or any court to decide whether the statute conforms to the requirements of the federal constitution.

The majority correctly points out that our court will only reverse the district court's refusal to abstain if such a refusal involves abuse of discretion. In the case at hand the district court did "abuse its discretion," and thus this court should overturn the decision. A leading article on abstention doctrine has persuasively argued:

[B]efore abstaining in an authorization case, the federal judge should ascertain whether abstaining will serve any purpose by determining which way he would rule on the state law issue in the absence of abstention. If he would hold the program unauthorized, so that abstention might prevent interference with a state program, he should also ascertain whether the program would suffer irreparable harm from interference. The greater the harm, the more this factor weighs in favor of abstention.

Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. of Pa.L.Rev., 1021 at 1126 (1974). Among the "imprecise factors" to be weighed in making the decision are "the degree of unclarity of state law; the extent to which error might harm a state program; and the extent to which the federal constitutional issue is sensitive and calls for swift adjudication." *Id.*

Here, the federal court's decision that the state's program is unconstitutional will irreparably damage the program. Moreover, the federal constitutional issue is complex and not one that demands immediate adjudication. And there is a possibility of a constitutional construction of the statute. See Parts III(C) & (D), *infra*. Thus, in this case the factors weigh in favor of abstention.

In making the decision to abstain in a particular case, a federal court must refer back to our system of federalism. Some issues demand federalization. One thinks, for example, of the rights of women and minorities. Given our national history, women and blacks have suffered harms unique to our nation, not to any given state. Thus, it is not only feasible but necessary to protect such rights on a national basis. Rarely is it appropriate for a court to abstain when it has before it a case addressing rights of women or minorities. *Los Angeles Unified School Dist. v. United States Dist. Court for the Central Dist. of Califor-*

nia, 650 F.2d 1004 (9th Cir.1981) (Ferguson, J., dissenting). Certain kinds of issues are not easy to federalize. Land reform in particular presents a situation in which the problems of each state vary widely. An attempt to federalize takes away from the state an important power and robs its people of any attempt to reach an innovative solution democratically.

### III. THE DOCTRINE OF PUBLIC USE

Having wrongly reached the merits in this case, the majority comes to the wrong conclusion about those merits. My analysis of the facts of this case and the applicable law convinces me that the statute under review is constitutional on its face. The majority errs, I think both by mischaracterizing the facts and by misconstruing the applicable law.

#### A. Standard of Review

If a federal court must consider the merits of a defendant's contention that a taking is not for a public use, the court should apply the proper standard of review. The court must give great deference to the state legislature's determination and to the ruling of the state's highest court. The standard of review is a narrow one. As a consequence:

[T]he Court has never actually held a use to be private which the courts of a state, with their intimate knowledge of local conditions and requirements (and with the concurrence of the legislature or even of the people of the state), have declared to be public.

Nichols, *Eminent Domain* § 7.31[1] [1980]. Of course, this court has been unable to profit from the wisdom of Hawaii's courts, whose judges are intimately knowledgeable about the conditions of that state, because the federal proceeding has aborted the orderly adjudication of issues in the state courts.

The majority is cognizant of precedent requiring great judicial deference to a legislative determination that a use is a public use. *Berman v. Parker*, 348 U.S. 26, 31-32, 75 S.Ct. 98, 101-02, 99 L.Ed. 27; *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-18, 90 L.Ed. 843 (1946); *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

The majority, however, incorrectly distinguishes those cases on the ground that they involve the review of a congressional rather than a state legislative determination.

In the most recent of those cases, *Berman, supra*, Congress authorized a taking in the District of Columbia. "The power of Congress over the District of Columbia," the Court specifically noted, "*includes all the legislative powers which a state may exercise over its affairs.*" *Berman, supra*, 348 U.S. at 31, 75 S.Ct. at 102 (emphasis added). In delimiting the scope of judicial review in eminent domain cases, the *Berman* Court referred to the narrow role that courts play in reviewing *state* legislation:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

*Berman, supra*, 348 U.S. at 32, 75 S.Ct. at 102 (emphasis added). In light of the firm language in *Berman*, I believe that it is not within our province to usurp the role of Hawaii's legislature.



The rule of deference was also set forth in *Welch, supra*, a case that preceded *Berman*. A commentator has remarked:

[I]t could be argued that the Court in *Welch* was reserving to itself a greater discretion to review the acts of state legislature in this area, but it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a state (in *Welch* the federal government condemned land in a state).

*Hawaii's Land Reform Act, supra*, at 37. Finally, *Gettysburg Electric Railway, supra*, 160 U.S. at 680, 16 S.Ct. at 429, cited with approval the rule "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." The Court in *Gettysburg* borrowed that rule from a standard work on municipal corporations—hardly a repository of lore about judicial review of congressional action.

The majority is unquestionably correct that it lies with the judiciary to make the ultimate determination of whether a use is public. This is merely a restatement of the principle of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). However, the majority is sadly mistaken if it believes that a restatement of the obvious negates the rule of judicial deference in eminent domain cases.

#### B. The *Fallbrook* Approach

The majority's approach to reviewing the taking issue comes closer to the mark when it states, "we must look at each case on an ad hoc basis," and quotes the language in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 159-60, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896), "[W]hat is a public

use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Unfortunately, the majority never analyses this case on the basis of its own particular facts and circumstances. Instead, the majority applies five mechanistic rules, described as "recurring facts and circumstances," derived from other cases. But general propositions do not decide concrete cases.

Before further considering the majority's wrong approach, it is instructive to consider the right approach of *Fallbrook Irrigation District, supra*. In that case, California had passed a law allowing irrigation districts to condemn property. In upholding the law, the court said:

[I]n a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the fact which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

*Id.* at 160, 17 S.Ct. at 64. *Fallbrook* is significant in two respects. First, in its emphasis on facts and circumstances, *Fallbrook* points to the significance that the shortage of water, an important state resource, has in determining whether a use is public. Second, *Fallbrook* stresses that the people of a state and members of her legislature have more familiarity than have strangers with the circumstances that justify a taking.

The reasoning in *Fallbrook* was reiterated in *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). *Clark* upheld a Utah law that gave individual landowners the right to condemn surrounding private land to irrigate their own private land. Shortage of water in Utah also helped to justify the taking. The court again emphasized that peculiar conditions may exist in a particular state, and that great deference is due to the knowledge that a state's citizens possess about local conditions:

Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.

*Id.* at 367-68, 25 S.Ct. at 678. Similarly, the state courts and legislature of Hawaii must be assumed to be exceptionally familiar with the land shortages in Hawaii and to have an informed understanding of social and economic consequences that result from this peculiar fact. A review of the Hawaii legislature's findings in this regard is illuminating.

### C. The Facts of the Case

In Hawaii, a special problem exists that did not exist in eighteenth century America: Land in that state is concentrated under the suzerainty of a few large landowners. The legislature of Hawaii has specifically found:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development had been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

The foregoing developments have compelled thousands of people in the State to resort to leaseholds to

satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

1975 Haw.Sess.Laws Act 184 § 1, cited in *Midkiff v. Tom*, 471 F.Supp. 871, 876 n. 21 (D.Hawaii 1979). The Trustees as a group are the single largest private landowners on Oahu. They own 15.1% of all land and 22.1% of all privately owned land on the island. *Midkiff v. Amemiya*, Civil No. 47103 (Haw.Ct.App.1978). *Findings of Fact and Conclusions of Law*, June 29, 1978. Much of Hawaii's population is concentrated on the island of Oahu, the island on which Hawaii's most populous city, Honolulu, is located.

The legislature has specifically found that the concentration of land, coupled with the large landowners' policy of leasing rather than selling that land, has undesirable economic and social effects. Among the undesirable economic effects are artificially high prices on leasehold units, the discouragement of the development of fee simple units, inequality of bargaining power that strongly favors the lessor in rental negotiations, and a decline in leasehold value after the renegotiation of leases. 1975 Haw.Sess. Laws Act 184 § 1(d).

The legislature has also found that residential leaseholds have undesirable social effects. In particular, the pattern of renegotiating leaseholds at ever higher and inflated prices aggravates

the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of Hawaii.

The Hawaii's legislature's findings and declaration of purpose are eloquent testimony to the need for a land reform program that will give persons an opportunity to own their own land. The following are excerpts from Hawaii Rev.Stat. § 516-83 (1976):

There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated[.] . . . Long-term leases . . . contain terms and conditions . . . that restrict their freedom to fully enjoy such land . . .;

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated . . .;

. . . [T]he ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, wel-



fare, security, and happiness of the people of the State;

... For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land, whether leasehold or fee. Stabilizing the cost of land, or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii ...;

The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few. ...

... Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. . . .

The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii. . . .

... The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. . . .

The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose. . . .

Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

The majority calls none of these findings of fact into question. Indeed, they are scarcely mentioned at all in the majority opinion. They persuade me, however, that the land reform statute which they prompted is well within constitutional limitations. The Hawaii legislature believes that the redistribution of land is necessary to curb inflation, to meet the housing needs of the elderly, and to allow citizens of the state to enjoy fully the land on which their houses are situated. These substantial economic and social goals are legitimate state interests. Given the peculiar facts of land distribution in Hawaii, it cannot be said that the redistribution of land in that state is an arbitrary or capricious means of achieving these interests. I would hold that where property is taken to achieve such substantial benefits for the citizenry, the property is put to a public use.

#### D. *Eastern Sugar Associates*

A case very much on point is *People of Puerto Rico v. Eastern Sugar Associates*, *supra*. That case upheld the constitutionality of a statute similar to the Hawaii Land Reform Act.

Relying directly on Laws of Puerto Rico Annotated, tit. 28, ch. 31 §§ 241 *et seq.*, a commentator has outlined the purposes of the Land Law of Puerto Rico:

The Puerto Rican Legislature passed the Land Law of Puerto Rico which was designed to break up the corporate latifundia (i.e. large landed estates) in order to improve the economic, political, and social health of the Islands. An Authority was created under the provisions of the Law and was given the power to condemn land. The Authority was instructed to carry out the purposes of the Law by (1) breaking up the latifundia and preventing their reappearance, (2) assisting in the creation of a new class of landowners and farmers, (3) providing means for the *agregados* and slumdweller to acquire parcels of land on which to

*build their homes*, and (4) taking all actions necessary to achieve the most economic, scientific, and efficient enjoyment of land by all of the People of Puerto Rico. Later the Legislature passed the Vieques Law which directed the Authority to acquire the land of Eastern Sugar Associates on the Island of Vieques.

*Hawaii's Land Reform Act, supra*, at 38 (footnotes omitted). *Agregados* were heads of families dwelling on land that they did not own.

The Authority filed in a Puerto Rican court a petition to condemn the land of Eastern Sugar Associates. After removal of the case on diversity grounds, the district court dismissed the petition for condemnation. The appeal presented the issue: "[W]hether on the pleadings it can be said that the appellees' land is sought to be taken for a public use." 156 F.2d at 320.

The court in *Eastern Sugar Associates* gave great deference to the determinations of the Legislature of Puerto Rico: "We are not, of course, concerned with the wisdom, expediency, or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which it is clearly established we have nothing whatever to do." 156 F.2d at 323.

While giving deference to the Puerto Rican Legislature, the court recognized:

Some public benefit or advantage must accrue from the transfer and mere financial gain to the takers is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of "an outside land speculation." . . . But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use.

*Eastern Sugar Associates, supra*, at 323.

The deference owed to the Puerto Rican Legislature, like that owed to Congress when it acts in the District of Columbia, *see Berman v. Parker, supra*, is easily explained: Congress conferred powers on the Puerto Rican Government which are "nearly, if not quite, as extensive as the general residual powers of a state." *Eastern Sugar Associates, supra*, at 322.

The majority, attempting to distinguish *Eastern Sugar Associates*, makes much of the individual uses described in the Puerto Rican legislation to argue that the land that was taken underwent a change in use. However, the court in *Eastern Sugar Associates* refused to consider individually the particular uses:

Each use plays a part in a comprehensive program of social and economic reform. *Thus we see no basis for analyzing each case separately. Instead we think the entire legislation should be regarded "as a single integrated effort," . . . to improve conditions on the island,* and so viewed we think enactment of the statutes within the power of the Insular Legislature.

*Id.* at 316 (citation omitted and emphasis added).

The court in *Eastern Sugar Associates* rejected the argument "that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public." *Eastern Sugar Associates, supra*, at 316. The court found that this argument had already been rejected several times in Supreme Court cases: *Rindge Co. v. Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Vernon Cotton Co. v. Alabama Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash, supra*; *Fallbrook Irrigation District, supra*.

### E. The Majority's Incorrect Approach

Even though the taking clause speaks of "public use," language that is broad in scope and not encompassed by a check list, and even though the precedents require an *ad hoc* approach, the majority nevertheless propounds five tests, drawn, it says, from the cases, by which to determine whether the use here is public. I turn now to a brief examination of the majority's check list:

1. *Historically accepted public use.* This test is helpful only in those simple cases that represent no expansion of past public uses. But as the majority itself recognizes, the law of eminent domain had very humble beginnings in mill acts and in the building of roads. The history of public use has been a history of the expansion of the concept to accommodate new circumstances. Eminent domain has been used to condemn slum areas, *Berman v. Parker, supra*; to distribute land to squatters, *People of Puerto Rico v. Eastern Sugar Associates, supra*; and to condemn a football league franchise, *City of Oakland v. Oakland Raiders, Ltd., supra*.

2. *Change in the use of land.* The majority acknowledges that the Hawaii Land Reform Act may change the use of land; after condemnation, the land would be used exclusively for residential rather than investment purposes, and persons who own land outright are likely to treat it differently than tenants would. Maj. op. *ante*, at 796-797. The majority then offers the non-sequitur that these "alleged changes in use . . . are simply different forms of *private* use."

This argument by label, namely, that the change in use is merely a change in private use, conceals a serious confusion. The word "use" is susceptible to two entirely different meanings, namely, "employment" and "advantage."

There may be a change in private use, in the sense of a change in the private employment of land, such that a



public advantage is conferred sufficient for the courts to hold that the land is now put to public use: the new private use in which the land is employed yields a public advantage. This occurred, for example, in *Clark v. Nash, supra*, a case in which an individual condemned private land to irrigate his own land. To dismiss an actual change in use as a mere change in "private use" is to ignore the possibility that a public advantage is thereby gained. The issue is whether the public advantage gained by a change in the private employment of land yields a public use.

3. *Change in possession.* The majority notes that a change in possession commonly occurs after a taking, then promptly cites two cases that undermine the rule.

In the instant case, continuous possession by the housing tract leaseholders is significant only because it favors their equities by diminishing possible hardships to the property owner. Whatever hardships might specifically burden a property owner who loses possession of house and land cannot be present in this case.

4. *Taking by the government.* The ultimate beneficiary of a valid taking is not the government: it is always the public. A taking by the government merely provides some insurance that it will be the public who benefits. To be sure, there is a danger, to which the courts must be alert, when the power of eminent domain is delegated to a private corporation. *United States v. Gettysburg Electric Ry. Co., supra*, 160 U.S. at 680, 16 S.Ct. at 429.

In the instant case, however, the state has not delegated authority to a private corporation. Indeed, insurance that the public will benefit is provided by the Hawaii Land Reform Act, which requires the Hawaii Housing Authority a governmental body, to find that the purposes of the Act will be effectuated by a taking, and which vests discretion in the Authority, not in private individuals. Haw.Rev.Stat. § 516-22.

5. *De minimis taking.* The majority notes that courts have upheld the condemnation of land where the taking is *de minimis* and for the purpose of facilitating the development of nearby land. The majority cites two cases. Need one add that courts have upheld numerous takings that were not *de minimis*?

The sovereign powers of a state exist to promote the health, welfare, security and happiness of the people of the state—in sum, to promote the public interest. Whether the Hawaii Land Reform Act has been wisely chosen as a means for achieving the legislature's objectives is not for us to say.

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

*Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 564, 31 S.Ct. 259, 261, 55 L.Ed. 328 (1911).

## CONCLUSION

I believe that the land reform program enacted by the Hawaii Legislature does not result in an unlawful taking of property. I also believe, however, that instead of reaching the merits of this question, the majority should have abstained in favor of ongoing state judicial processes. On both grounds I therefore register my dissent.

**Appendix B**

Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate, Plaintiffs,

v.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N. C. Ing, Nobuyoshi Tamura, Andrew I. T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority, Defendants,

and

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahaione Valley Community Association, Inc.; Kamiloiko Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waian Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation, Interveners.

Civ. No. 79-0096.

United States District Court,  
D. Hawaii

Dec. 19, 1979.

## AMENDED MEMORANDUM DECISION

SAMUEL P. KING, Chief Judge.

The Trustees of the Estate of Bernice Pauahi Bishop<sup>1</sup> filed suit in this Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act, now chapter 516 of the Hawaii Revised Statutes, was unconstitutional. Chapter 516 allows the State to use the power of eminent domain in order to condemn certain residential land and then sell it to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of chapter 516.

In Hawaii, a few landholders, including the Bishop Estate, own large tracts of residential land. It has been the policy of these landholders to offer long-term leases to individual lessees, rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of landholding as injurious to the well-being of the people of Hawaii, and adopted chapter 516 in order to allow long-term residential leaseholders the opportunity to buy in fee the land they occupy under a lease.

One of the provisions of chapter 516 provides for a compulsory arbitration procedure that sets the compensation to be paid the fee owners when the land is condemned. A broad temporary restraining order was issued by me on February 28, 1979, and a modified temporary restraining

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<sup>1</sup>In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls, known as the Kamehameha Schools.

order, enjoining only the implementation of the mandatory arbitration provisions of the statute, was issued on March 27, 1979. A preliminary injunction, declaring those provisions unconstitutional was issued on May 8, 1979. D.C., 471 F.Supp. 871. In my opinion of May 8, 1979, I indicated that the remainder of chapter 516 was probably constitutional. Plaintiffs' constitutional challenge to the remainder of the statute is that the taking of property for the purpose of reselling it to the residential lessees is not for a public purpose, and hence violative of the Fifth Amendment command: "[N]or shall private property be taken for public use, without just compensation."

Plaintiffs have urged this Court to conduct a trial, weigh evidence, and make what is in essence an *a priori* determination of whether the takings authorized by chapter 516 are for a public use. Plaintiffs intend to show that each and every legislative rationale for the statute is wrong.<sup>2</sup> They claim that if all the economic justifications for the statute are disproved, all that is left are social justifications—such as the social engineering goal of land redistribution. These social goals, contend the plaintiffs, cannot alone justify the taking as being for a public use. Plaintiffs concede that the legislative findings as to the economic justifications for the statute should be given deference, but argue that the standard for determining whether the taking is for a public use is *not* whether the legislative findings have a rational basis. They do not point to any particular standard to be used by the Court, except to say that the Court must make a new judicial determination. The plaintiffs indicated at oral argument they view the question of whether the taking is for a public use as an economic and factual question rather than a legal one.

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<sup>2</sup>Haw.Rev.Stat. § 516-83 (1976) contains a long list of legislative findings and declarations of purpose and necessity relating to chapter 516.

This Court disagrees. I must make a judicial determination of whether the taking is for a public purpose, but that determination is limited in scope to the question of whether the plaintiffs were denied substantive due process. The goal, the purpose, the *raison d'être* of the statute must be within the purview of the State's police power, and the means chosen by the Legislature to achieve that goal must not be arbitrary, capricious, or in bad faith. If the Court determines (1) that *any* possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, then the statute is constitutional.

The starting point in any legal analysis is *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In that case the Supreme Court held constitutional the District of Columbia Redevelopment Act of 1945. The Act provided for the comprehensive use of the eminent domain power to redevelop slum areas, and also provided for the possible later sale or lease of the condemned lands to private interests. The Court discussed whether the takings authorized by the Act were for a public purpose.

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citations omitted] or the States legislating concerning local affairs. [citations omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. [citations omitted]



Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

348 U.S. at 32, 75 S.Ct. at 102. The Supreme Court viewed the question of whether the takings were for a public purpose in the same way that it viewed any substantive due process claim. The key question was whether the object of the statute was within the police power authority of the legislature.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [citations omitted] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33, 75 S.Ct. at 103.

Some courts have taken an extremely narrow view of the judiciary's role in determining whether a taking is for a public purpose. In *United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975), Mr. Justice Clark was considering a claim that a taking was not for a public purpose because it was in aid of a commercial project.

Though appellant's statement pieces together and rewrites different grounds from different objections, we will accept his version as the strongest presentation

of his dual claims that the proposed taking was not for a public purpose and was arbitrary and capricious. Even under these circumstances, however, he has not alleged any sufficient defense. *The only question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is for a Congressionally authorized public use.* [citations omitted] It is not for the courts to review the necessity of the taking. [citations omitted] Nor is it for the courts to consider broadside allegations that the purported public use to be served is merely a pretense or a sham to cover arbitrary official conduct. [citations omitted] Only in cases of egregious bad faith will the the right to condemn be denied [citation omitted] for in those circumstances the taking may not be for a "public" use at all.

514 F.2d at 631-32 (emphasis added) Justice Clark's view was that courts could nullify a taking as not being for a public use *only* in the case of bad faith. There is no bad faith alleged in this case, and were this Court to adopt Justice Clark's test, the inquiry into the constitutionality of the statute would end immediately. However, some cases in this Circuit have indicated that judicial review may extend to the question of whether the taking is arbitrary and capricious.<sup>3</sup>

There are cases similar to Justice Clark's that indicate judicial inquiry ends when it is determined that a taking is for a Congressionally authorized use,<sup>4</sup> other cases that

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<sup>3</sup>See *Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966), cert. denied, 386 U.S. 1030, 87 S.Ct. 1478, 18 L.Ed.2d 592 (1967); *United States v. 18.2 Acres of Land*, 442 F.Supp. 800 (E.D.Cal.1977).

<sup>4</sup>See, e.g., *United States v. 255.25 Acres of Land*, 553 F.2d 571, 572-73 n. 2 (8th Cir. 1977).

indicate inquiry is limited to determinations of bad faith or arbitrary action,<sup>5</sup> still others that say police power/due process standards are to be used in determining whether a taking is for a public purpose,<sup>6</sup> and even cases that pay lip service to the proposition that a government taking for purpose of transferring condemned property to private hands is not necessarily for public purpose.<sup>7</sup>

After carefully considering all these cases, the Court has determined that the proper test to be used is that suggested by *Berman*—a police power/due process analysis. It would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else—whether stricter or not. Plaintiffs have cited many cases for the proposition that courts have great latitude in making judicial determinations of what is public use. These cases, however, were almost all decided before

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<sup>5</sup>*United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058-59 (7th Cir. 1973); *United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963) (language of case somewhat unclear but seems to indicate that judicial determination of public purpose is limited to questions of bad faith or arbitrary action); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1278 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("We note that the court has no power to go beyond a determination that the legislative body has acted in bad faith or in an arbitrary manner").

<sup>6</sup>*People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946); *United States v. 67.59 Acres of Land*, 415 F.Supp. 545, 548-50 (M.D.Pa. 1976).

<sup>7</sup>*Washington-Summers, Inc. v. City of Charleston*, 430 F.Supp. 1013, 1014-15 (S.D.W.Va. 1977) ("[I]t is equally clear that property cannot be taken by eminent domain for a predominantly private purpose"); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1279 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("[I]ndustrial and commercial use by itself does not constitute a public purpose").

1930. At that time, to say the least, it took very little to invalidate a statute on substantive due process grounds. On the other hand, I believe those courts that say judicial review is extremely limited do so because they cannot conceive of legislative actions that are neither arbitrary nor in bad faith, yet still outside the limits of the police power. If the object of chapter 516 (or any one of several objects) is to further the health, safety, morals, or general welfare of the people of Hawaii, and if the means chosen to accomplish that object are rational and not in bad faith, the statute is constitutional.

Hawaii, as discussed earlier, has an uncommon system of landholding. A substantial part of all residential land is held by a few interests and leased to a large number of residential lessees. Plaintiffs, Trustees of the Bishop Estate, hold a significant portion of the residential land on Oahu. Section 516-83 of the Hawaii Revised Statutes is entitled "Legislative findings and declaration of necessity; purpose" and in it the Legislature sets forth numerous economic and non-economic rationales for chapter 516. Plaintiffs argue that they can demonstrate that all the economic justifications for the statute are incorrect, and that the Legislature was wrong in enacting the statute. Yet, in order to uphold the constitutionality of chapter 516, this Court believes all it need do is look at the broadest possible rationale for the statute—that of redistributing residential land and changing the pattern of residential ownership in Hawaii. I believe this purpose is within reach of the police power, and hence the takings authorized by the statute are for a public purpose. All that the Court need rely on in the way of evidence to support this conclusion is the system of landholding in Hawaii—the concentration of land in a few large landholders. At the preliminary injunction hearing, there was testimony and documentary evidence concerning the way land is held in Hawaii. The Court believes that given this system of landholding, the Legis-

lature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land of large landholders-lessors and allowing the lessees to purchase that land from the State. The Legislature had the right to conclude that Hawaii's system of landholding was injurious to the social and economic health of the community.

In *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946), the Legislature of Puerto Rico enacted the Land Law of Puerto Rico, a far-reaching program of agrarian reform that provided for the condemnation of privately owned land, and for its sale to private parties for residential use and farming. The Vieques Act, also passed by the Legislature of Puerto Rico, provided for the acquisition of land on two outlying islands for the purpose of renewing their sugar industry and establishing a distillery. Pursuant to these Acts, Puerto Rico petitioned the court to condemn 3100 acres of land held by Eastern Sugar Associates. Eastern Sugar challenged the condemnation, claiming the taking was not for a public purpose. The court first concluded that the test for determining public use was a due process test—not some *a priori* judicial determination of public purpose. The court noted that “a taking of property from one, for the purpose of transferring it to another, without anything more, [does not necessarily conform] to due process of law.” 156 F.2d at 323. However, all that was needed was “some public benefit or advantage” other than mere financial gain for the state. *Id.* The court then went on to note:

In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking “be essential or material for the prosperity of the community.” [citation omitted] And in the second place

a local Legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity. . . . This [program] may be, as the appellees contend, "state socialism." But concrete cases are not to be decided by calling names. Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; [citation omitted] it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist.

156 F.2d at 324. In this case, the purpose of the statute is in no way to confer immediate monetary gains upon the State as some sort of land speculator. Looking only at one social goal of the legislation—that of redistributing the land—this Court could never say, regardless of how much "evidence" was presented by the plaintiffs, that the Legislature's belief in the social evils to be combated by chapter 516 was arbitrary. Social benefit alone is enough to bring a statute within the purview of the police power. It is true that the Puerto Rico statutes were a broader effort on the part of the Puerto Rico Legislature than was chapter 516 on the part of the Hawaii Legislature. It is true that the Puerto Rico statutes were more comprehensive than chapter 516, and were enacted to combat what were perhaps more serious evils. Yet, it is the Legislature's province to determine just how far to go in trying to solve a problem or series of problems. There are limits to legislative line drawing—those imposed, by, *inter alia*, the equal protection clause—but those are not at issue in this case. What is at issue is the right of the Legislature to conclude, as it did, that "The State's acquisition of residential lands held in fee simple, through the exercise of the power of



eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii." Haw.Rev. Stat. § 516-83(10) (1976).

In *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969), the court was considering a Guam redevelopment plan. Prior to World War II, Agana, the capital of Guam, was a patchwork of streets and lots going every which way. Agana was almost completely destroyed in the war, and the government decided to rebuild it. The government wanted, however, to have straight streets and lots. In order to achieve this goal, it condemned land simply to force consolidation of the odd lots. Its purpose was not to hold the land for any particular reason, but rather to sell the new even lots, after condemnation, to private individuals. The Ninth Circuit found that this constituted a public purpose. It is difficult for this Court to see how condemning land to have even streets is more for a public purpose than condemning land so that a large number of long-term lessees can have the opportunity to own the land they live on. Certainly the Hawaii Legislature's determination that the social well-being of the people of Hawaii is served by land redistribution is entitled to as much deference as was given the determination that the social and/or economic well-being of the people of Guam was served by having straight streets.

If the goal of the statute—that of land redistribution—is within the ambit of the State's police power, then the only remaining question for the Court is whether the means chosen to achieve that goal are arbitrary. There has been no suggestion by the plaintiffs that if land redistribution is a public purpose the statute is nonetheless arbitrary. There are of course some lines drawn, but line drawing is always necessary in social legislation, and the scope of the Court's review of where those lines are drawn is very

narrow. This Court finds that the Legislature's determinations of what land is subject to condemnation and who is entitled to repurchase from the State are in no way arbitrary or capricious.

Even were this Court's view that land redistribution constitutes a permissible public purpose encompassed by the police power incorrect, the Legislature has propounded many economic justifications for the statute. The following are excerpts from Haw.Rev.Stat. § 516-83 (1976).

[S]erious shortage of fee simple residential land . . . .

[A]rtificial inflation of residential land values in the State . . . .

[T]he people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated . . . .

[The leases] restrict their freedom to fully enjoy [their] land and . . . are weighted heavily in favor of the few landowners of such land . . . .

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values . . . .

If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values. . . .

Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention . . . will help satisfy the pressing public necessity for a secure, strong and stable economy. . . .

The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter.

These are just some of the justifications for the act that are set forth in § 516-83. There is no doubt at all that these economic rationales such as lowering prices and curbing inflation, are clearly encompassed by the police power. This has been the law of the land since the New Deal. The only question for judicial consideration is whether the means chosen by the Legislature to achieve these goals—chapter 516—is arbitrary. In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated. Plaintiffs have indicated that they could call many witnesses to show that the Legislature was wrong—that chapter 516 will not lower prices, curb inflation, or do anything else to help the people of Hawaii. Yet, it is not this Court's function to determine if the Hawaii Legislature was wrong. It is this Court's job only to determine whether the Hawaii Legislature acted arbitrarily in enacting chapter 516. No matter how much evidence plaintiffs were to present, they could not establish that the Legislature was arbitrary with respect to every economic rationale advanced in support of the statute. The Legislature determined that chapter 516 would bring down prices, and in our system of government that determination is for them and them alone to make. There are limits to judicial deference,

but those limits are not even approached in this case. The Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court.

Since the question of whether the takings authorized by chapter 516 are for a public purpose is a legal one, and since this Court has made its determination, there is no point in this case proceeding any further on this issue. Defendants are entitled to summary judgment on the issue of the facial constitutionality of chapter 516, subject to this Court's prior rulings on the statutory provisions relating to mandatory arbitration and just compensation.

Defendants may prepare an appropriate order.

**Appendix C**

Frank E. Midkiff et al., Plaintiffs,

v.

Paul A. Tom et al., Defendants,

and

Wai-Kahala Tract "H" Association, Inc.,  
et al., Intervenor.

Civ. No. 79-0096.

United States District Court,  
D. Hawaii.

May 8, 1979.

**DECISION ON MOTION FOR PRELIMINARY  
INJUNCTION**

SAMUEL P. KING, District Judge.

The Trustees of the Estate of Bernice Pauahi Bishop<sup>1</sup> filed suit in this court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority<sup>2</sup> and the Hawaii Housing Authority<sup>3</sup>

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<sup>1</sup>Plaintiffs refer to themselves as "Trustees of the Kamehameha Schools/Bishop Estate." The Kamehameha Schools were established in accordance with the wishes of Princess Bernice Pauahi Bishop as expressed in her will. The named plaintiffs are trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, appointed as such by the Supreme Court of Hawaii. See *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), cert. denied, sub nom. *Kekoa v. Richardson*, 417 U.S. 930, 94 S.Ct. 2641, 41 L.Ed.2d 233 (1974). The testamentary trust is commonly referred to as the Bishop Estate.

<sup>2</sup>The Commissioners and Executive Director are sued in their individual and official capacities.

<sup>3</sup>The Hawaii Housing Authority is "a public body and a body corporate and politic with perpetual existence" which is "placed

itself, praying for a declaration that the Hawaii Land Reform Act<sup>4</sup> be declared unconstitutional.

A temporary restraining order against implementation of mandatory arbitration was granted pending a hearing and decision on a preliminary injunction.<sup>5</sup> That hearing was held on April 24-27, 1979.

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within the department of social services and housing for administrative purposes." Haw.Rev.Stat. § 365-5(a) (1976). The authority is charged generally with the duty of carrying out the State's responsibilities under state and federal statutes with respect to housing. Haw.Rev.Stat. § 356-7 (1976).

<sup>4</sup>1967 Haw.Sess.Laws Act 307, as amended by 1968 Haw.Sess. Laws Act 46, 1969 Haw.Sess.Laws Act 203, 1971 Haw.Sess.Laws Act 215, 1972 Haw.Sess.Laws Act 2, 1975 Haw.Sess.Laws Acts 184, 185, and 186, 1976 Haw.Sess.Laws Acts 159, 200, and 242, and 1978 Haw.Sess.Laws Act 140. These acts are set forth in Haw.Rev.Stat. ch. 516 (1976). See also: Haw.Rev.Stat. ch. 519 (1976). Plaintiffs attack specifically the provisions of § 516-1(14) (defining "owner's basis"), §§ 516-22 to 24 (authorizing condemnation) and §§ 516-51 to 55 (providing for mandatory arbitration).

<sup>5</sup>A temporary restraining order was issued on February 28, 1979, in the form requested by plaintiffs. Upon reflection, I determined that this order was too broad. At a subsequent conference with counsel, I announced *sua sponte* that I would modify this order to make it clear that steps preliminary to arbitration were not enjoined. The Order Modifying Temporary Restraining Order was entered on March 27, 1979. By stipulation between plaintiffs and (then) defendants dated February 28, 1979, and entered as an order of the court on March 2, 1979, the expiration date of the temporary restraining order was extended from March 10, 1979, to March 14, 1979. A further extension from March 14, 1979, to April 24, 1979, was similarly stipulated to on March 7, 1979, and entered as an order of the court on March 9, 1979. A motion filed on March 20, 1979, by the O'Connor Intervenors to dissolve the temporary restraining order or in the alternative for security in the amount of \$1,000,000 was denied on March 27, 1979. A motion filed on March 20, 1979, by the Bays Intervenors to modify the temporary restraining order was in effect denied on March 27, 1979, by the court's *sua sponte* modification in different language.



Motions to intervene were filed by several Bishop Estate lessee organizations.<sup>6</sup> All motions were granted on March 23, 1979.

At this stage of the proceedings, the evidence adduced and arguments presented concentrated on the facial constitutionality of Chapter 516 of the Hawaii Revised Statutes.<sup>7</sup> Some evidence related to the actual application of

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<sup>6</sup>On March 7, 1979, by WAI-KAHALA TRACT H ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE-IKI COMMUNITY ASSOCIATION; and WAIU COMMUNITY ASSOCIATION, all represented by Hoddick, Reinwald, O'Connor & Marrack, hereinafter sometimes referred to as the O'Connor Intervenors.

On March 8, 1979, by KAHALA COMMUNITY ASSOCIATION, INC.; and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND, represented by Carlsmith, Carlsmith, Wichman and Case, hereinafter sometimes referred to as the Bays Intervenors.

On March 12, 1979, by HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, represented by Kemper & Watts, hereinafter sometimes referred to as the Watts Intervenor.

<sup>7</sup>It was not deemed appropriate to consolidate the hearing on the preliminary injunction with the hearing on the merits, as all parties desired to engage in extensive discovery. While much discovery can probably be avoided by pretrial conferences with the court, certain basic constitutional issues can be addressed immediately on stipulated facts with only limited testimony.

the law, but this was limited to setting the context within which the law was supposed to operate.<sup>8</sup> For purposes of the hearing, it was agreed that the court could take as true the legislative findings set forth from time to time when this and related laws were enacted or amended.<sup>9</sup>

Chapter 516 authorizes the use of the State's power of eminent domain to permit lessees of residential lots to acquire the fee simple title to their homes.<sup>10</sup> The Hawaii Housing Authority is given the power and duty to carry out the provisions of this chapter.<sup>11</sup> The Authority established the position of Land Reform Administrator to handle this function and adopted regulations implementing the statute.<sup>12</sup>

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<sup>8</sup>The Bishop Estate is an eleemosynary testamentary trust. The statute in question applies in terms to "all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands . . . and lands owned or held by the federal government." Haw.Rev. Stat. § 516-2 (1976). For purposes of this hearing, no distinction is made as to the power of the legislature to legislate with respect to the land holdings of a perpetual eleemosynary trust as opposed to the land holdings of private individuals.

<sup>9</sup>Especially, the legislative findings in 1967 Haw.Sess.Laws Act 307 § 1, 1975 Haw.Sess.Laws Act 184 § 1, and 1975 Haw.Sess.Laws Act 186 §§ 1 and 2. 1975 Haw.Sess.Laws Act 186 § 2 is set forth in Haw.Rev.Stat. § 516-83 (1976). For the language of these findings, *see* note 21, *infra*.

<sup>10</sup>Haw.Rev.Stat. §§ 516-21 to 45 (1976).

<sup>11</sup>Haw.Rev.Stat. §§ 516-6 and 7 (1976).

<sup>12</sup>Rule of the Department of Social Services and Housing, Hawaii Housing Authority, State of Hawaii, approved by Governor John A. Burns on November 1, 1968, after a public hearing as required by Haw.Rev.Stat. ch. 6C (1955) (now Haw.Rev.Stat. ch. 91 (1976)), and subsequently amended to reflect statutory changes. The present AMENDED RULE 10 is entitled: A REGULATION PERTAINING TO THE HAWAII HOUSING AUTHORITY OF THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING, IMPLEMENTING ACT 307, SESSION LAWS OF HAWAII, 1967, AS

The Trustees object to the application of this land reform statute to the Bishop Estate lands on three principal grounds. First, they say that the State's power of eminent domain cannot constitutionally be used for the intended purpose in that the benefits derived from such use inure solely to private individuals.<sup>12</sup> Second, they say that the statute unconstitutionally mandates less than fair market

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AMENDED BY ACT 46, SESSION LAWS OF HAWAII, 1968; ACT 203, SESSION LAWS OF HAWAII, 1969; ACT 215, SESSION LAWS OF HAWAII, 1971; ACT 2, SESSION LAWS OF HAWAII, 1972; ACT 184 AND ACT 186, SESSION LAWS OF HAWAII, 1975; AND ACT 242, SESSION LAWS OF HAWAII, 1976.

<sup>12</sup>Haw.Rev.Stat. § 516-30 (1976) provides for the sale to a lessee by the Hawaii Housing Authority of the leased fee interest to the lot leased by the lessee after the authority has acquired that leased fee interest. The lessee must qualify pursuant to Haw.Rev.Stat. § 516-33 (1976) and meet certain other requirements. This purpose of the law is spelled out in Haw.Rev.Stat. § 516-83(5) (1976) in the following language:

The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions [set forth in preceding subparagraphs] and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

If a lessee fails to purchase his leased lot, the authority becomes the lessor, subject to all the provisions of law applicable to lessors. Haw.Rev.Stat. §§ 516-30 and 31 (1976). Presumably the authority will not exercise its power to acquire a lessor's leased fee interest unless sufficient activity by lessees has taken place pursuant to Haw. Rev.Stat. § 516-22 (1976) and unless sufficient assurances of purchase by lessees have been received in the form of contracts to purchase as contemplated by Haw.Rev.Stat. § 516-30 (1976) and AMENDED RULE 10 § 17.

value as compensation for the taking of the owner's leased fee interests.<sup>14</sup> Third, they say that the compulsory arbi-

<sup>14</sup>1967 Haw.Sess.Laws Act 307 provided in § 13 for payment upon condemnation of "the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract." A "lessee's interest" or "leasehold interest" was defined in § 2(h) to mean "the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment . . . ." The "lessee's value increment" was defined in § 2(i) to mean "the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot."

1968 Haw.Sess.Laws Act 46 in § 2e redefined the "compensation to be paid for the development tract" of Act 307 § 13 to be "the current fair market value of the tract, valued as if the fee title to the tract were unencumbered and the tract were undeveloped and unsubdivided, plus the unpaid balance owing to the lessor by lessees of the lots in the tract as reimbursement for the actual offsite improvement costs paid for by the lessor; provided, that in no event shall the compensation be less than the sum of the present worth of the future rental income stream under the leases to lots in the tract and the present worth of the lessor's reversionary interest in the leased lots." This act also, in § 2b and c, deleted the earlier definitions of "lessee's interest" and "lessee's value increment" and substituted a definition of "off-site improvements" to mean "all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by occupants of all lots for whose benefit the improvements have been constructed or placed."

1975 Haw.Sess.Laws Act 184 again changed the provisions of Act 307 relating to compensation. Haw.Rev.Stat. § 516-24 (Act 307

tration provisions of the statute violate constitutional guarantees.<sup>15</sup>

§ 13) was amended to provide that the "compensation to be paid for the leased fee interest in a residential house/lot within a [development] tract shall be the owner's basis as defined in section 516-1 (14)." "Owner's basis" was a new definition added to Act 307 § 2. This was defined as "the current fair market value of the lost excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty percent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor." The definition of "offsite improvements" was expanded to make it explicit that "gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes" were included.

1976 Haw.Sess.Laws Act 242 made the final changes with which we are now concerned. "Owner's basis" was redefined as "the current fair market value of the lot." The definition then went on to provide that the "fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value." The definition continued with language which on its face seems to mandate that this value "shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest" and sets forth a method "(A)" (a discounted future rental income stream plus a discounted lessor's reversionary interest) and a method "(B)" (current market value less the lessee's interests). This act also provides for mandatory arbitration of compensation in advance of condemnation and that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceedings under this chapter." See note 24 *infra*.

<sup>15</sup>Compulsory arbitration appears for the first time in 1976 Haw. Sess.Laws Act 242 § 4, adding a new Part IIA to Haw.Rev.Stat. ch. 516 entitled "MANDATORY ARBITRATION OF COMPENSATION" and consisting of five sections. Arbitration is instituted by

In making a preliminary determination of these issues at this time, I am governed by the test enunciated in *Aguirre v. Chula Vista Sanitary Service*,<sup>16</sup> that is, that a preliminary injunction should issue "upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief.'"<sup>17</sup> I shall analyze each of the listed objections in the light of this teaching from *Aguirre*.

First, I am of the opinion that the State may use the power of eminent domain to redefine, rearrange, or redistribute interests in land.<sup>18</sup> Throughout recorded history,

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the Hawaii Housing Authority if voluntary negotiations fail. In this event, assuming the required number of qualified lessees have applied to the authority to purchase the leased fee interest in their residential leasehold lots, "the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 [Hawaii's statute on agreements to arbitrate] to establish an amount of just compensation which shall be paid to lessor for the lessor's leased fee interest under section 516-24."

It is interesting to note that the House bill which ended up as Act 242 did not mention arbitration, the Senate amended to provide for arbitration by agreement, and the conference committee reported out a bill with the existing mandatory arbitration provisions.

<sup>16</sup>542 F.2d 779 (9th Cir. 1976).

<sup>17</sup>*Id.* at 781.

<sup>18</sup>*See Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed.2d 1085 (1905) (upholding statutory authority given an individual in Utah to condemn an easement across another individual's land for the purpose of enlarging an irrigation ditch serving the condemnor's land); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906) (upholding statutory authority given a mining corporation in Utah to condemn a right of way for an aerial bucket line across a placer mining claim of another individual); *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (upholding statutory authority



the manner in which land is permitted to be held and used has been of critical importance to all members of a given society.<sup>19</sup> It is not enough to acquiesce in legislation that looks only to the future. The ingenuity of man could postpone the future to an unacceptable remoteness in time.<sup>20</sup>

Furthermore, the legislature has defined the public interest and the public purpose behind Chapter 516.<sup>21</sup> Whether or not the prohibition of the Fourteenth Amendment against depriving any person of property without due pro-

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given a power company in Alabama to condemn private property for its purpose); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding the District of Columbia Redevelopment Act of 1945); *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) (upholding Puerto Rico's statutory program for redistribution of land based on the territory's power of eminent domain); *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969) (upholding Guam's urban redevelopment statute).

<sup>19</sup>See *Public Land Policy in Hawaii: Major Landowners*, Legislative Reference Bureau, State of Hawaii, Report No. 3 (1967); *Public Land Policy in Hawaii: An Historical Analysis*, Legislative Reference Bureau, State of Hawaii, Report No. 5 (1969); *Green v. Frazier*, 44 N.D. 395, 176 N.W. 11 (1920), *aff'd*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878 (1920).

<sup>20</sup>See 3 J. REEVES, HISTORY OF THE ENGLISH LAW 324-25 (2d ed. 1787).

<sup>21</sup>1975 Haw.Sess.Laws Act 186 § 2 (Haw.Rev.Stat. § 516-83). The section reads as follows:

Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

## Note 21—Continued

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

## Note 21—Continued

(7) The Constitution of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the

## Note 21—Continued

realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter] is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter].

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

## Note 21—Continued

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

1967 Haw.Sess.Laws Act 307 § 1 set forth the first legislative findings in this area as follows:

Findings and declaration of necessity. The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration

## Note 21—Continued

of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land had led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The term and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.



## Note 21—Continued

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Relevant legislative findings are also found in 1975 Haw.Sess. Laws Act 184 § 1, Act 185 § 1, and Act 186 § 1 as follows:

#### ACT 184 FINDINGS AND PURPOSE

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners.

## Note 21—Continued

The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

- (1) The scarcity of fee simple residential lands have [sic] pushed the price of fee simple residential units to high levels;

- (2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

- (3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

- (4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residence are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

- (5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental

## Note 21—Continued

as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rental was increased) [sic], causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

## Note 21—Continued

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

## ACT 185 FINDINGS AND PURPOSES

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been lease-

Note 21—Continued

hold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1 (g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concen-

## Note 21—Continued

trated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition to inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g. a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.



## Note 21—Continued

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

## ACT 186 FINDINGS AND PURPOSE

Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

cess of law is the same as the prohibition of the Fifth Amendment against the taking of private property for public use without just compensation,<sup>22</sup> under either Amendment "public use" includes "public interest."<sup>23</sup>

Second, I am of the opinion that the statutory definition of "owner's basis"<sup>24</sup> raises serious constitutional questions.

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<sup>22</sup>See *Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Rodgers v. Tolson*, 582 F.2d 315, 318 (4th Cir. 1978); *Gordon v. City of Warren*, 579 F.2d 386, 389-90 (6th Cir. 1978); *O'Grady v. City of Montpelier*, 573 F.2d 747, 750 n. 8 (2d Cir. 1978).

<sup>23</sup>See *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938). See also cases cited in note 18, *supra*.

<sup>24</sup>Haw.Rev.Stat. § 516-1(14) (1976). The definition reads as follows:

"Owner's basis" means the current fair market value of the lot. The fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest:

(A) The sum of: (i) the future rental stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or

The first two sentences of Haw.Rev.Stat. 516-1(14) are not objectionable.<sup>25</sup> Thereafter, the definition attempts to qual-

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(B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite improvements, established by a market data approach utilizing comparable sales, less the following:

(i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;


(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sales, and similar fees;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions.

<sup>25</sup>These two sentences equate fair market value of the leased fee interest with just compensation to the lessor. This accords with



ify "fair market value" and "just compensation" by setting forth two and only two methods by which just compensation "shall" be determined, and by mandating that method which "gives the greater consideration to the lessee's interest."<sup>26</sup> Without going into the details of Method A<sup>27</sup> and Method B,<sup>28</sup> it is clear to me that the definition can pass

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accepted Constitutional requirements. *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573, 575, 18 S.Ct. 445, 42 L.Ed. 853 (1898); *United States v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 87 L.Ed 336 (1943).

<sup>26</sup>Intervenors argue that the controlling phrase is "just compensation" and the rest of the definition must be read in that light. Thus if method "(A)" results in "just compensation" and method "(B)" does not, but method "(B)" gives "the greater consideration to the lessee's interest," method "(B)" is not to be used. Actually, the definition is logically incomplete as it does not provide for the circumstance wherein "just compensation" and "the greater consideration to the lessee's interest" do not both result from applying the same method. Beyond that, the definition semantically inconsistent in that the use of a method that gives the lessee's interest greater consideration implies that that method gives the lessor's interest lesser consideration, which leaves the meaning of "just compensation" understandable only in terms of a dialect of newspeak.

<sup>27</sup>Haw.Rev.Stat. § 516-1(14)(A) (1976), *supra* note 24. The method described is agreed by all testifying experts to be one acceptable method of determining fair market value of a leased fee interest, except that the discount rate should be determined by market conditions and not fixed by statute. The testimony was to the effect that application of the statutory formula resulted in a discount rate the same as or somewhat more favorable to the lessor than the discount rate in the market. While the method appears to be straight forward and definite, intervenors' experts testified that there were some six judgment calls that had to be made by an appraiser in using this method.

<sup>28</sup>Haw.Rev.Stat. § 516-1(14)(B) (1976), *supra* note 24. Again all experts agreed that the general approach is one acceptable method of determining the fair market value of a leased fee interest. Plaintiffs' experts testified, however, that if followed literally,

constitutional scrutiny under the Fourteenth Amendment only if everything after the first two sentences in this definition of "owner's basis" is ignored. That, in essence, is what I understand defendants and intervenors to argue that I should do.<sup>29</sup>

Third, I am of the opinion that the mandatory arbitration provisions of Part IIA<sup>30</sup> are unconstitutional on their face.<sup>31</sup> The statute provides that mandatory arbitration shall be in advance of and not any part of any action in eminent domain,<sup>32</sup> that mandatory arbitration shall be conducted and carried into effect before a condemnation action

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the method as defined could not result in "just compensation." Intervenors' experts testified that the method was presently rather unless because of the paucity of market data, and that the itemization of what to deduct was considered to be more of a checklist than a required list of items to be valued. Intervenors' appraisers considered items (ii), (iii), (iv), and (v) to be included under item (i), and all experts had difficulty accommodating item (vi).

<sup>29</sup>One difficulty with the detailed and restrictive approach of § 516-1(14) is that it purports to exclude any method other than method "(A)" and method "(B)" as therein defined. But intervenors' experts testified that they did not consider themselves to be so restricted by the statutory language. Neither expert, in applying the statute, actually compared the results obtained by applying method "(A)" with the results obtained by applying method "(B)" to determine which method gave "the greater consideration to the lessee's interest," and both, in applying method "(A)" built in an inflation factor which offset the mandatory discount rate. In effect, they decided what in their opinion present fair market value of the leased fee interest in a lot amounted to, and then adjusted the several judgment calls involved to justify this opinion.

<sup>30</sup>Haw.Rev.Stat. ch. 516 Part IIA (1976).

<sup>31</sup>It is assumed, for purposes of this hearing, that we are only considering the application of these provisions to leases executed prior to June 15, 1976, the date this part took effect.

<sup>32</sup>Haw.Rev.Stat. § 516-51(b) provides:

This mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

has been commenced,<sup>33</sup> and that the purpose of the mandatory arbitration is "to establish [the] amount of just compensation which will be paid to lessor for the lessor's leased fee interest" in the event of condemnation.<sup>34</sup> All defendants agree that the lessor eventually is accorded a right to a jury trial on the issue of just compensation,<sup>35</sup>

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<sup>33</sup>Haw.Rev.Stat. § 516-53 (1976) provides:

Timing of mandatory arbitration. Mandatory arbitration under this part shall be conducted and carried into effect before a condemnation action has been commenced.

<sup>34</sup>Haw.Rev.Stat. § 516-51(a) (1976) provides:

Mandatory arbitration of compensation authorized. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If negotiations fail then the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest under section 516-24.

<sup>35</sup>Haw.Rev.Stat. § 516-23 (1976) provides in part that "the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101." Haw.Rev.Stat. ch. 101 (1976) contains Hawaii's general statutory provisions relating to eminent domain. § 101-11 provides that "the procedure shall be the same as in other civil actions." This includes the right to a jury trial on the issue of compensation of damages. See *State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967).

This is not to say that a State may not employ other procedures for determining just compensation. See *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3055 (1973). Here, mandatory arbitration is specifically stated *not* to be any part of any action in eminent domain. See notes 32 and 33, *supra*.



that just compensation is equivalent to fair market value,"<sup>36</sup> and that fair market value is to be determined by the jury based on all relevant evidence."<sup>37</sup>

The statute provides that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter."<sup>38</sup> But the mandatory arbitration is to proceed pursuant to Haw.Rev.Stat. Chap. 658,<sup>39</sup> which provides for proceedings in a circuit court confirming, vacating, modifying, or correcting an award, and a further appeal to the State supreme court.<sup>40</sup> By the time these procedures have been completed, considerable time will have elapsed.<sup>41</sup> Yet the date of valuation in condemnation is the date of designation by the Hawaii Housing Authority,<sup>42</sup> which has no necessary relationship to the date as of which "just compensation" is determined pursuant to the mandatory arbitration, and would be expected to come after the final completion of the mandatory

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<sup>36</sup>See cases cited in note 25 *supra*.

<sup>37</sup>See *United States v. Miller*, 317 U.S. 369, 373-75, 63 S.Ct. 276, 87 L.Ed 336 (1943).

<sup>38</sup>Haw.Rev.Stat. § 516-55 (1976).

<sup>39</sup>Haw.Rev.Stat. § 516-51(a) and § 516-54(a)(6) (1976).

<sup>40</sup>Haw.Rev.Stat. § 516-54(a)(6) (appeal to circuit court), § 658-8 (award; confirming award), § 658-9 (vacating award), § 658-10 (modifying or correcting award), § 658-15 (appeal when) (1976).

<sup>41</sup>"The Supreme Court of Hawaii is falling alarmingly behind in disposing of its expanding caseload. The current backlog is sufficient, given existing disposition rates, to occupy the Court for three years." Levinson, *Appellate Caseload in Hawaii*, 13 HAW. BAR J. (No. 3) 3 (1977).

<sup>42</sup>Haw.Rev.Stat. § 516-24 provides that the compensation to be paid for the lessor's leased fee interest "shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

arbitration proceedings and a further refusal by the lessor to convey."<sup>3</sup>

And then when the final judgment has been entered determining the arbitration award, the lessee does not have to purchase the lessor's leased fee interest,<sup>4</sup> and the Hawaii Housing Authority does not have to commence condemnation proceedings.<sup>5</sup> Nevertheless, and even if there is a purchase or a condemnation, the lessor must pay one-half of all expenses and fees of arbitration proceedings incurred by the arbitrators,<sup>6</sup> without reimbursement.<sup>7</sup>

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<sup>3</sup>The mandatory arbitration provisions of the chapter do not specify the date as of which "just compensation" shall be determined. Presumably the arbitrators will specify the date they have used in reaching their award. § 516-51(a) does provide that the purpose of the mandatory arbitration is "to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest" under § 516-24. But for the latter purpose, by § 516-24, just compensation is to be determined as of the date of designation, which by § 516-53 is supposed to come after the completion of arbitration. Since the arbitrators can hardly be expected to guess when the Hawaii Housing Authority will designate a development tract for acquisition, the date of valuation for purposes of mandatory arbitration and the date of valuation for purposes of condemnation will necessarily be different, by possibly several years.

<sup>4</sup>The only effect of the arbitration award is that it "shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter." Haw.Rev.Stat. § 516-55 (1976).

<sup>5</sup>Haw.Rev.Stat. § 516-51(b) (1976).

<sup>6</sup>Haw.Rev.Stat. § 516-54(a)(5) (1976) provides:

All expenses and fees of arbitration proceedings incurred by arbitrators shall be paid one-half by lessors and one-half by lessees.

<sup>7</sup>Haw.Rev.Stat. § 516-23 (1976) provides in part that, after a designation pursuant to § 516-22:

If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings

This in itself may be a taking of property without just compensation.<sup>48</sup>

Having reached the conclusions set forth above, I must still decide whether a preliminary injunction should issue and if so what should be enjoined. The statute in question contains a very comprehensive severability clause.<sup>49</sup> Thus, unless the statute must stand or fall as a whole, specific provisions that may be invalid may be separated out, leaving the other provisions in force.

I am of the opinion that those portions of the definition of the "owner's basis" to which the Trustees object are severable. I frankly do not believe that striking everything after the first two sentences in Haw.Rev.Stat. 516-1(14) would have any effect whatsoever on the operation of the statute or on the manner in which appraisers value the lessor's leased fee interest.<sup>50</sup> In any event, there is no pending matter involving these objected-to provisions that requires a preliminary injunction.

I am of the opinion that the mandatory arbitration provisions of the statute likewise are severable. In fact, the

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are not instituted within the twelve-month period [after designation], the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

There is no similar provision with respect to the expenses incurred as a result of the mandatory arbitration proceedings of Part IIA.

<sup>48</sup>See 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3056 (1973); *Supplementary Report of the Advisory Committee on Rule Governing Condemnation Cases*, 11 F.R.D. 222, 243 (1951).

<sup>49</sup>Haw.Rev.Stat. § 516-82 (1976). Although the statutory provision came from 1975 Haw.Sess.Laws Act 184 § 2, similar severability provisions were contained in 1967 Haw.Sess.Laws Act 307 § 44, and in 1976 Haw.Sess.Laws Act 242 § 6.

<sup>50</sup>See discussion in notes 26, 27, 28, and 29, *supra*. None of this language was in the original Hawaii Land Reform Act. See legislative history set out in note 13, *supra*.

statute as originally passed did not contain this part, which was added in 1976.<sup>51</sup> Unlike the objectionable features of the "owner's basis" definition, however, the Trustees are presently faced with a demand by the Hawaii Housing Authority to enter into mandatory arbitration pursuant to the statute.<sup>52</sup> As I have indicated that in my opinion the Trustees will probably succeed on the merits of this issue, I must determine whether there is possible irreparable injury to the Bishop Estate or a balance of hardships tipping decidedly toward the Trustees so as to make just and proper the issuance of a preliminary injunction enjoining the implementation of Part IIA of Chapter 516 of the Hawaii Revised Statutes.

A preliminary injunction limited to mandatory arbitration affects only one pending group of lessees of 102

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<sup>51</sup>See discussion in note 15, *supra*.

<sup>52</sup>Letter dated January 22, 1979, from the Acting Executive Director of the Hawaii Housing Authority to the Trustees of the Bishop Estate informing the Trustees that the Commission of the Authority on January 18, 1979, had by a unanimous vote decided to invoke mandatory arbitration in connection with the leasehold to fee simple conversion of lots in Tract H as requested by the Wai-Kahala Tract H Association, Inc., and pursuant to the Authority's Rule 10, Section 10. The latter concluded with the directive that "the parties are ordered to begin mandatory arbitration upon receipt of this notice."

An earlier letter dated August 21, 1978, from the Land Reform Administrator to the Trustees notified the Trustees that Tract H petitioners had "asked to proceed to arbitration" and stated that "it is appropriate that the arbitration period required by that section [1976 Haw.Sess.Laws Act 242 § 4] commence." This letter advised the Trustees that "you have 30 days from the date of receipt of this letter to name an arbitrator; the petitioners are also naming an arbitrator." The Trustees refused to name an arbitrator. Among other grounds, they did not consider this letter as having been properly authorized.

lots.<sup>53</sup> It is not likely that many other lessees would be similarly affected for several months. Even those prevented by a preliminary injunction from starting the mandatory arbitration procedures may seek a designation pursuant to Haw.Rev.Stat. § 516-22 which would have the effect of fixing the date of valuation.<sup>54</sup>

On the other hand, the Trustees would be forced into a proceeding which could set a precedent affecting several thousand lots<sup>55</sup> and which could make them liable for an indeterminate amount in unrecoverable costs.<sup>56</sup>

As I balance the relative interests of the parties and of the public, I am of the opinion that the *Aguirre* test for the issuance of a preliminary injunction has been met.

The preliminary injunction shall be in the same form as the Temporary Restraining Order as modified on March

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<sup>53</sup>The only group of Bishop Estate lessees who have progressed to the point where the Hawaii Housing Authority may direct the lessor and lessees to submit to mandatory arbitration are those in so-called Tract H represented by WAIKAHALA TRACT H ASSOCIATION, INC. Tract H comprises 102 lots.

<sup>54</sup>Haw.Rev.Stat. § 516-22 and § 516-24 (1976). While Part IIA provides that mandatory arbitration shall precede condemnation, there is no requirement that mandatory arbitration shall precede designation.

<sup>55</sup>While Tract H of 102 lots is the only Bishop Estate development tract which is presently at the stage when mandatory arbitration may be ordered, several other Bishop Estate tracts involving about 7,000 lots are going through the procedures established by the Hawaii Land Reform Act for leasehold to fee simple conversion.

<sup>56</sup>From 1918 through March 1977, the Bishop Estate executed some 20,735 residential leases in development tracts. At present there are in force some 13,500 such leaseholds involving approximately 3,500 acres of land. 6,280 leases of lots in residential development tracts were executed from 1967 to 1977, inclusive.

27, 1979,<sup>57</sup> with the further proviso that steps outside of Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.<sup>58</sup>

Intervenors suggest security in the amount of \$1,000,000 to cover possible damages to lessees for a wrongful injunction. The Trustees suggested and posted security in the amount of \$100 on the temporary restraining order. In my opinion, each lessee is adequately secured against inflationary or real increases in value by the lessor's leasehold fee interests in the lot leased by the lessee. This is not to imply that the lessees might have any claim. The injunction actually runs only against the Hawaii Housing Authority. I do believe, however, that a more substantial sum than \$100 is called for, notwithstanding the financial resources of the Bishop Estate. Under the circumstances I believe security in the sum of \$10,000 would be proper.

Counsel for the respective parties and intervenors shall attempt to agree upon a form of preliminary injunction for submission to the court on or before May 15, 1979, or in default of agreement, shall submit their respective suggestions on the same date.

The foregoing constitute the court's findings and reasons required by Rule 65(d) of the Federal Rules of Civil Procedure.

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<sup>57</sup>Restraining only steps under Part IIA following a letter from the Hawaii Housing Authority directing the lessor and the lessee(s) to submit to mandatory arbitration.

<sup>58</sup>Plaintiffs cannot be seriously damaged in the next several months as actual condemnation is not that imminent. In this area, a balancing of the interests of the parties and of the public leads me to the conclusion that a preliminary injunction should not issue, even if plaintiffs might ultimately prevail on their claim that the State's power of eminent domain may not be used to accomplish the purposes of the Hawaiian Land Reform Act.



**Appendix D**

**ACT 307**

**S. B. 1128.**

**A Bill for an Act Relating to Residential Leaseholds, the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof, and the Rights of Lessees.**

*Be It Enacted by the Legislature of the State of Hawaii:*

**PART I**

**GENERAL PROVISIONS**

**Section 1. Findings and declaration of necessity. The legislature finds that:**

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

“All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . . .”

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and

chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of

private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the

ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

The legislature declares as a matter of legislative determination that:

Section 2. Definitions. Unless otherwise clear from the context, as used in this Act:

(a) "Lease" means a conveyance of land by a fee simple owner as lessor, or by a lessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term (1) exceeding thirty-five years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases existing and in force on the date of approval of this Act, or (2) exceeding twenty years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases executed after the date of approval of this Act.

(b) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives and assigns.

(c) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives and permitted assigns.

(d) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent and a holder of a defeasible estate, and his heirs, successors, legal representatives and assigns.

(e) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in

the fee or in the lessor's leasehold estate, including mortgagees, developers, lienors and sublessors, and their respective heirs, successors, legal representatives and assigns.

(f) The terms "lessor", "lessee," "fee simple owner", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee", the terms also include corporations, firms, associations, trusts, estates, and the State. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(g) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor and all legal and equitable owners of the land which is leased, other than the lessee's interest as hereinafter defined.

(h) "Lessee's interest" and "leasehold interest" mean the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment as hereinafter defined.

(i) "Lessee's value increment" means the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot.

(j) "Lot", "housetot", "residential lot", and "residential houselot" mean a parcel of land, one acre or less in size, which is used or occupied, or is developed, devoted, intended or permitted to be used or occupied as a principal place of residence for a single family.

(k) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(l) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots occupied or to be occupied under leases. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, or other like interference.

(m) "Authority" means the Hawaii housing authority created by chapter 74, Revised Laws of Hawaii 1955.

Section 3. Applicability. The provisions of this act apply to all lands leased as residential lots which are situated in counties with a population of 100,000 or more, owned or held privately or by the State, except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government.

Section 4. No estoppel or waiver. The rights granted to lessees by this act shall be effective, notwithstanding any provision in any lease or contract to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted to him or otherwise be deemed to have waived



such right. Any provision in any lease or contract contrary to the intent or purpose of this act shall be void.

Section 5. Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to the effective date of this act or is created hereafter; and the life tenant, holder, officer or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required of him by this act. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this act.

Section 6. Penalty. [omitted]

Section 7. Administration of act. The Hawaiian housing authority shall administer this act.

Section 8. Authority's duties, generally. In addition to any other duty prescribed by law and in this act, the authority shall:

• • •

(g) Acquire by eminent domain proceedings, all necessary property interests as provided in this act.

(h) Make and execute contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the authority.

(i) Issue revenue bonds and refunding bonds as provided in this act.

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Section 9. [omitted]

## PART II

## CONDEMNATION OF DEVELOPMENT TRACT

Section 10. Applicability. This part applies to development tracts which are, at the time of acquisition of the tracts by the authority as provided herein: (a) developed and subdivided into residential houselots occupied by lessees under leases executed before the date of approval of this act; (b) developed and subdivided or partially developed into residential houselots occupied or to be occupied by lessees under leases executed after the date of approval of this act, provided that ten or more years remain before the final termination of the lease term, and provided further that 90 per cent of the leases to the lots have been executed.

Section 11. Designation of development tract for acquisition. The authority may designate a development tract for acquisition through exercise of the power of eminent domain or by purchase under threat of eminent domain if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes described in this act and shall also find either

(a) that a shortage of fee simple residential property exists in the county and that the acquisition and disposition of the development tract by the authority as provided in this part will assist in alleviating this shortage pursuant to the purposes of this act, or

(b) that the lessees of more than 50 per cent of the residential lease lots within the development tract are

desirous of owning the leased fee interest to their lots and have the financial capabilities to pay for the same in the manner provided in this part.

The findings of the authority shall be conclusive in any suit, action or proceedings.

**Section 12. Exercise of power of eminent domain.** Within twelve months after the designation of the development tract for acquisition, the authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the tract so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 8, Revised Laws of Hawaii 1955. If the development tract is not acquired or eminent domain proceedings are not instituted within the twelve month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

**Section 13. Compensation.** The compensation to be paid for the development tract shall be the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract. Compensation shall be determined as of the date of the designation of the development tract for acquisition.

**Section 14. Interest acquired.** (a) Upon acquisition of a development tract as provided in this part, the property interest acquired by the authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the development tract acquired; subject to existing leases of residential

houselots within the development tract, and to all covenants, conditions, easements, reservations and restrictions of record running with the land or contained in the agreement of sale, deed or other conveyance held by the fee owner, lessor and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title and interest of the fee owner, lessor and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the leasehold is subject to any mortgage, lien or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage or assignment, the purchase of the leased fee by the lessee shall in no manner affect or impair such mortgage, lien or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to extent necessary to avoid any impairment of such leasehold security, unless the holder of such leasehold mortgage, lien or encumbrance shall in writing consent to the transfer thereof to the fee as herein provided. Upon such written consent by the holder thereof, each such mortgage, lien or encumbrance to which the leasehold is subject and to which such consent refers shall be transferred to and shall bind the fee acquired by the lessee, and shall thereafter continue in full force and effect as a mortgage, lien or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Section 15. Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable

owners shall share in the compensation paid by the authority as their respective interests shall appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority and in the absence of such agreement, the interest of a developer or other person entitled to share in the lease rentals shall equal his total share in the lease rentals for the remainder of the period during which he would have been entitled to share in the lease rentals, discounted to present day value.

Section 16. Compulsory or involuntary conversion. It is the intent of the legislature, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of chapter 121, Revised Laws of Hawaii 1955, as well as all other statutes, rules, regulations, administrative orders and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the authority under the provisions of this part shall constitute a compulsory or involuntary conversion (as a result of the exercise of the power of condemnation or the threat of imminence thereof), and that such fee owner shall not be deemed, by reason in whole or in part of any provision of this part or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this act, to hold the property primarily for sale to customers in the ordinary course of trade or business.

Section 17. Disposition, generally. It shall be the policy of the authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be

sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot. Except in case of a sale to the lessee of the leased fee interest to his leasehold residential lot, no sale in fee simple or lease shall be made unless the purchaser meets all of the qualifications enumerated in section 22.

Section 18. Notice of disposition. Except in case of a sale of the leased fee interest to the lessee of a residential lot under lease, no sale or lease of any residential lot shall be made by the authority unless he has published on at least two different days in a newspaper of general circulation in the county, a notice of its intent to sell or lease. The notice shall state, in general terms, the size, location and prices or lease rentals of the lots to be sold or leased, the terms of the sale or lease, and the last date on which applications will be received by the board, which date shall not be less than thirty days after the first publication of such notice. The notice shall also state the times and places at which more detailed information with respect to the sale or lease may be secured by interested persons.

Section 19. Option of lessee to purchase leased fee. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, may purchase from the authority at any time during the term of his lease the leased fee interest to the lot; provided, that the lessee is not then in default in the performance of his obligations under the lease; and provided, further that the sales price shall be at the lowest possible price consistent with section 21 and the purpose of this act.

Section 20. Disposition by lease. The authority may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as



it may determine. Such leases shall be subject to all of the rights of lessees enumerated in part III of this act. The authority may, in its discretion, utilize any of the residential lots and rent out the same for periods of twenty years or less for the purposes set forth in Title 8, Revised Laws of Hawaii 1955, or for any other purpose, all upon such terms and conditions as the authority may determine.

Section 21. Not for profit.

. . .

Section 22. Qualification for lease or purchase. Except in the case of a sale to the lessee of the leased fee interest to any residential lot under lease, no lease or sale of any residential house lot within a development tract shall be made to any person:

(a) Unless he is a citizen of the United States or a declarant alien who has resided in the State for a period of five years or more; is at least twenty years of age; is a bona fide resident of the State and has a bona fide intent to reside in the development tract if successful in purchasing or leasing the lot; and has sufficient financial capabilities to meet the sales price or lease rentals.

(b) Who owns in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the authority an unrefused application to lease or purchase a lot in a development tract. A person shall be deemed to own lands herein if he, his spouse or both he and his spouse (unless separated and living apart under a decree of a court of competent jurisdiction) owns such lands.

The authority may require additional testimony or evidence under oath in connection with any application. The determination by the authority of any applicant's eligibility under this part shall be conclusive as to all persons there-

after dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

Section 23. Mortgages, agreements of sale, other instruments. (a) If the purchaser of a fee simple title or leased fee is unable to obtain sufficient funds at reasonable rates from private lenders, the authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the lessee up to ninety per cent of the purchase price.

(b) The purchaser of the fee simple title or leased fee shall pay not less than ten per cent of the price and execute with the authority an agreement of sale or mortgage or other instrument to secure the indebtedness under the terms of which the unpaid balance and the interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness or instrument of indebtedness may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize and sell the property foreclosed.

Section 24. Restrictions on sale and use of residential lots. (a) For a period of five years after the lease was initially issued by the authority for a residential lot, or after the purchase from the authority of the fee simple

title to a residential lot where the purchase was made other than as a result of the exercise by a lessee of his option to purchase the leased fee, the lessee or purchaser shall not assign the lease or sell the fee unless he has first notified the authority in writing of his intention to assign or sell. The notice shall specify the lessee's or purchaser's address and shall expressly offer to sell such property to the authority at a price which shall not exceed the sum of the original cost to the lessee or purchaser less depreciation at the rates used for real property tax purposes, of all buildings and improvements thereon.

(b) Within thirty days after the receipt of such notice the authority shall in writing notify the lessee or purchaser at the address so specified whether it elects to exercise its option. If the authority refuses, or fails within the thirty-day period to reply to the offer, the lessee or purchaser may assign the lease or sell the property in fee to any person, free from any price restrictions.

(c) The authority may lease, rent or resell any lot and improvements so purchased as any other lot held by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed by this section.

**Section 25. Bonds.** From time to time, the authority may issue revenue bonds, and also refunding bonds for the purpose of paying or retiring bonds previously issued, in such amounts as it may deem advisable for the purpose of this part. The authority may issue such types of bonds as it may determine, including bonds on which the principal and interest are payable exclusively from the income and revenues of the development tract, the acquisition and development of which are financed with the proceeds of

such bonds or from the income and revenues of other development tracts, the acquisition and development of which are not financed with the proceeds from such bonds. Any such bonds may be additionally secured by a pledge of any other revenues received. Any provision of any law to the contrary notwithstanding, all bonds issued pursuant to this act shall be fully negotiable.

Neither the members of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

Section 26. State and political subdivisions not liable on bonds.

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Section 27. Form and sale of bonds.

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Section 28. Provisions of bonds.

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Section 29. Bonds as legal investments.

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Section 30. Exemption from taxation and assessments.

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Section 31. Investment of reserves.

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Section 32. Security for funds deposited.

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Section 33. Fee simple residential revolving fund.

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**PART III**  
**RIGHTS OF LESSEES**

Section 34. Applicability. Except as otherwise expressly provided, this part applies to all leases existing and in force on the date of approval of this act and to all leases executed thereafter.

Notwithstanding any term, condition or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part.

Section 35. Discrimination.

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Section 36. Free assignability.

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Section 37. Forfeiture.

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Section 38. Extension.

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Section 39. Lease rental.

. . .

Section 40. Zoning changes.

. . .

Section 41. Rights to self-organization; remedies.

. . .

Section 42. Sale of fee by lessor. No fee owner of any residential lot under lease shall sell the leased fee interest to the lot to any third party unless he has first given a written thirty-day notice to the lessee and the authority of such intention.

Section 43. Reversion of improvements. At the termination of any lease, or at the expiration of the lease term, the lessee may remove all improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor.

**PART IV**  
**SEVERABILITY, JUDICIAL DECLARATION,**  
**AND EFFECTIVE DATE**

Section 44. Severability.

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Section 45. Judicial declaration on validity of act. Any time after the date of approval of this act, any interested person may petition the supreme court for a judicial declaration as to the validity of any provision of this act pursuant to chapter 227 or chapter 228, Revised Laws of Hawaii 1955.

Section 46. Effective date. Parts I, III and IV shall take effect upon approval of this act; part II shall take effect on July 1, 1969.

(Became law June 24, 1967, without Governor's signature pursuant to State Constitution, Art. III, § 17.)



**Appendix E**

**ACT 184**

**S.B. NO. 1200**

**A Bill for an Act Relating to Residential Leaseholds.**

*Be It Enacted by the Legislature of the State of Hawaii:*

Section 1. Findings and purpose. The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been in leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent pe-

riod (e.g., a house appraised at \$68,000 before renegotiation of lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session

Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

Section 2. Chapter 516, Hawaii Revised Statutes, is amended as follows:

1. Section 516-1 is amended to read:

"Sec. 516-1 Definitions. Unless otherwise clear from the context, as used in this chapter:

(1) "Authority" means the Hawaii housing authority created by chapter 356.

(2) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, fee lot, or other like interference.

(3) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(4) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and his heirs, successors, legal representatives, and assigns.

(5) "Lease" means a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a

lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, (A) exceeding thirty-five years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to existing leases and in force on June 24, 1967, or (B) exceeding twenty years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases executed after June 24, 1967.

(6) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor, and all legal and equitable owners of the land which is leased, other than the lessee's interest as defined by this chapter.

(7) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in the fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

(8) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives, and assigns.

(9) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives, and assigns.

(10) The terms "lessor," "lessee," "fee simple owner," "fee owner," and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee," the terms also include corporations, firms, associations, trusts, estates, and the State or its political subdivisions. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(11) "Lot," "housetot," "residential lot," and "residential houselot" mean a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

(12) "Offsite improvements" means all physical improvements such as, but not limited to roads, sewer lines, sewage treatment plants, gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by the occupants of all lots whose benefit the improvements have been constructed or placed.

(13) "Onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(14) "Owner's basis" means the current fair market value of the lot excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor."



2. Section 516-2 is amended to read:

"Sec. 516-2 Applicability. This chapter applies to all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to residential leasehold lessees or the State, including those available under chapter 480."

3. Section 516-4 is amended to read:

"Sec. 516-4 Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to June 24, 1967 or is created hereafter; and the life tenant, holder, officer, or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform any acts required of him by this chapter. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner shall, while acting pursuant to this chapter, be deemed to be acting in bad faith or to have committed a breach of trust."

4. Section 516-7 is amended to read:

"Sec. 516-7 Authority's duties, generally. In addition to any other duty prescribed by law and in this chapter, the Hawaii housing authority shall:

• • •

(7) Acquire by eminent domain proceedings, all necessary property interests as provided in this chapter;

• • •

5. Section 516-21 is amended to read:

"Sec. 516-21 Applicability. This part applies to development tracts which are, at the time of acquisition of leased fee interests in residential lots within such tracts by the Hawaii housing authority as herein:

(1) Developed and subdivided into residential house-lots occupied by lessees under leases executed before June 24, 1967;

(2) Developed and subdivided or partially developed into residential house-lots occupied or to be occupied by lessees under leases executed after June 24, 1967, provided that ten or more years remain before the final termination of the lease term, and provided further that ninety per cent of the leases to the lots have been executed."

6. Section 516-22 is amended to read:

"Sec. 516-22 Designation of leased fee interest in all or part of development tract for acquisition. The Hawaii housing authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential house-lots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the leased fee interest in residential house-lots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter and shall also find either:

(1) That a shortage of fee simple residential property exists in the county and that the acquisition and

disposition of the leased fee interests in residential houselots in all or part of the development tract by the authority as provided in this part will assist in alleviating this shortage pursuant to the purposes of this chapter, or

(2) That twenty-five or more lessees or the lessees of more than fifty per cent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33.

The findings of the authority shall be conclusive in any suit, action, or proceeding."

7. Section 516-23 is amended to read:

"Sec. 516-23 Exercise of power of eminent domain. Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101. If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, lessor, and the legal and equitable owners may have incurred as a result of the designation."

8. Section 516-24 is amended to read:

"Sec. 516-24 Compensation. The compensation to be paid for the leased fee interest in a residential houselot within a development tract shall be the owner's basis as defined in section 516-1(14). The compensation shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

9. Section 516-25 is amended by amending subsection (a) to read:

"(a) Upon acquisition of the leased fee interest in residential houselots within all or a portion of a development tract as provided in this part, the property interest acquired by the Hawaii housing authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the residential houselots acquired; subject to existing leases of residential houselots within the development tract, and to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether the interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective."

10. Section 516-26 is amended to read:

"Sec. 516-26 Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable owners shall share in the compensation paid by the Hawaii housing authority as their respective interests appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in

the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority, or in the absence of such agreement, pursuant to chapter 658."

11. Section 516-28 is amended to read:

"Sec. 516-28 Disposition, generally. It shall be the policy of the Hawaii housing authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot.

12. Section 516-30 is amended to read:

"Sec. 516-30 Purchase of leased fee interest. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, who has applied to the authority and has qualified for purchase of the leased fee interest shall purchase from the Hawaii housing authority by contract within sixty days of acquisition of the interest by the authority, the leased fee interest to the lot, subject to the terms, covenants, and conditions of the contract executed with the authority; provided that the lessee is not then in default in the performance of his obligations under the lease; and further provided that should any of said lessees fail or refuse to enter into such a contract, then in such event, each such lessee shall pay to the authority his pro-rata share of all costs incurred by the authority in the acquisition of the houselots within the development tract including but not limited to appraisal costs, costs of publication, and

survey, and the authority is hereby authorized to take whatever action it deems necessary to collect such costs; and provided further that in case of a wilful breach of the purchase agreement the authority shall be entitled to any available remedy, including the sale of its interest in the house lot; and further provided that the sales price shall be at the lowest possible price consistent with section 516-32 and the purpose of this chapter."

13. Section 516-33 is amended to read:

"Sec. 516-33 Qualification for purchase. Except as otherwise provided under section 516-28, no sale of any residential house lot within a development tract shall be made to any person unless he meets the following requirements:

- (1) Is at least eighteen years of age;
- (2) Is a bona fide resident of the State and has a bona fide intent to reside in the development tract if successful in purchasing the lot;
- (3) Is a bona fide owner of a residential structure situated on the leased lot applied for;
- (4) Has a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that he will be able to promptly pay the authority for the leased fee interest in the lot;
- (5) Submits an application in good faith accompanied by a deposit to be established by the authority, not to exceed \$500, as earnest money to be applied to the purchase price;
- (6) Executes a contract for purchase of fee interest in such form as is acceptable to the authority; and
- (7) Does not own in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the Hawaii housing author-



ity an unrefused application to lease or purchase a lot in a development tract. A person is deemed to own lands herein if he, his spouse, or both he and his spouse (unless separated and living apart under a decree of a court of competent jurisdiction) owns lands.

In the event of a wilful breach of contract of a lessee to purchase the leased fee interest, the authority may sell or assign its interest without respect to the requirements of this section.

• • •

14. Section 516-34 is amended to read:

"Sec. 516-34 Mortgages, agreeemnts of sale, other instruments. (a) If an applicant who wishes to purchase the leased fee interest in his residential leasehold lot is unable to obtain sufficient funds at reasonable rates from private lenders, the Hawaii housing authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the purchaser up to ninety per cent of the purchase price; provided that such agreement of sale shall be for a term not to exceed three years; provided further that the authority, upon its discretion, may extend such agreement of sale for not more than two years if the lessee requests such extension. In case of any dispute of the extension of the agreement of sale, the lessee shall bear the burden of proof to show good cause for such extension.

(b) The purchaser of the leased fee interest shall pay not less than ten per cent of the price and execute with the authority an agreement of sale, or mortgage, or other instrument to secure the indebtedness under the terms of which the unpaid balance and interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness, or instrument of indebtedness shall be freely assignable by the authority and

may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize, and sell the property foreclosed."

15. Section 516-35 is amended to read :

"Sec. 516-35 Restrictions on sale and use of residential lots. (a) For a period of ten years after the purchase from the authority of the leased fee interest in a residential lot, the purchaser shall not transfer any interest in the property unless he has first notified the authority in writing of his intention to do so.

The notice shall specify the purchaser's address and shall expressly offer the authority the right of first refusal, at a price which shall not exceed the amount of the original cost to the purchaser together with the cost of any improvements added by the purchaser together with simple interest on all of the purchaser's equity in the property at the rate of seven per cent a year; provided that title to a dwelling unit and the property or lease may pass to a family member by devise or through the laws of descent, who would otherwise qualify under the rules and regulations established by the authority.

(b) Within thirty days after the receipt of the notice the authority shall in writing notify the purchaser at the address so specified whether it elects to exercise its option. If the authority refuses, or fails within the thirty-day period to reply to the offer, the lessee or purchaser may trans-

fer any interest in the property to any person, free from any price restrictions.

(c) The authority may lease, rent, or resell any lot and improvements purchased by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage, and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed in this section."

16. Sections 516-36 through 516-39 are repealed.

17. Section 516-45 is amended to read :

"Sec. 516-45 General obligation bonds. The director of finance may, from time to time, issue general obligation bonds in such amounts as may be authorized by the legislature, for the purpose of acquisition by the Hawaii housing authority of residential houselots within development tracts pursuant to chapter 516, part II or for the acquisition of suitable properties to exchange pursuant to section 516- or for the acquisition by the department of land and natural resources under section 171- of suitable properties for exchange pursuant to section 171- to effectuate the purpose of this chapter. The principal and interest of general obligation bonds issued pursuant to this section shall be reimbursed to the general fund from the fee simple residential revolving fund as provided in section 516-44. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of legislative authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced."

18. Section 516-66 is amended to read :

"Sec. 516-66 Lease rental. In every case of an extension under section 516-65 the annual lease rental during the first

thirty years shall not exceed an amount determined as follows:

. . .

19. Section 516-70 is amended to read:

"Sec. 516-70 Reversion of improvements. (a) This section applies to all leases of residential lands as defined by section 516-1(5).

(b) At the termination of any lease, or at the expiration of the lease term, the lessee may, if not then in default under the terms of his lease, remove all onsite improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor. If the lessee notifies the lessor in writing within sixty days before the termination or expiration that he declines to remove such onsite improvements and if the lessee is not then in default under the terms of his lease, and if the lessor refuses to extend the term of the existing lease or to issue a new lease for a term of at least thirty years at a rental that is mutually agreeable to the parties or failing such agreement that is determined by arbitration pursuant to chapter 658, the lessor shall be required to compensate the lessee for the current fair market value of all such onsite improvements. Such improvements shall be appraised at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658. The compensation shall be determined by mutual agreement or in conformity with chapter 658, and the compensation shall be paid within thirty days of determination. Such expense of arbitration shall be equally shared by both parties."

20. Section 516-81 is repealed.

21. Chapter 516 is amended by adding the following new sections, to be appropriately designated and to read:

"Sec. 516- Exchanges. (a) The authority may exchange public lands for private lands to be condemned or

involuntarily sold pursuant to this chapter; provided that any such exchange shall be subject to legislative disapproval; provided further that lands exchanged need not be of like-kind or comparable use; and provided further that no lands classified as conservation shall be exchanged for private lands.

(b) The authority may acquire private lands by negotiated sale for purposes of exchanging such land with private lands pursuant to subsection (a). The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible.

Sec. 516. Severability.

. . .

Section 3. Chapter 171, Hawaii Revised Statutes, is amended by adding the following two new sections, to be appropriately designated and to read:

"Sec. 171- Acquisition of lands for exchange under chapter 516. The board may acquire private lands by negotiated purchase to be exchanged to effect the conversion of leasehold lands to fee simple ownership under section 171- . The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible.

Sec. 171- Exchanges for conversion of leasehold lands to fee simple ownership. The board may exchange public lands for private lands to be condemned or involuntarily sold pursuant to chapter 516. Such exchange shall be requested by the executive director of the Hawaii housing authority, and shall be effected in conformity in section 171-50; provided that such exchange shall be subject to legislative disapproval; provided further that the private lands conveyed to the State shall be disposed of pursuant to chapter 516; and provided further that lands exchanged

need not be of like-kind or comparable use; provided further that no lands classified as conservation shall be exchanged for private lands."

Section 4. Section 2 of Act 215, Session Laws of Hawaii 1971, is amended to read as follows:

"SECTION 2. The director of finance is authorized to issue general obligation bonds of the State in the amount of \$5,000,000, for the purpose of acquisition by the Hawaii housing authority of development tracts, or exchange of lands therefor, pursuant to chapter 516, part II, Hawaii Revised Statutes. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced."

[omitted]

SECTION 6. This Act shall take effect upon its approval.

(Approved June 2, 1975.)



**Appendix F**

ACT 185

H.B. NO. 55

A Bill for an Act Relating to the Hawaii Lease Rent Renegotiation Relief Act. *Be It Enacted by the Legislature of the State of Hawaii:*

Section 1. Findings and purposes. The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for resi-

dential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have

already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to

30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

**SECTION 2.** Chapter 519, Hawaii Revised Statutes, is amended as follows:

1. Chapter 519 is amended by amending its title to read:

**"REAL PROPERTY LEASES"**

2. Chapter 519, is amended by adding a new section to be appropriately designated and to read:

**"Sec. 519- Residential leases of real property. (a) All leases for residential land, as defined by section 516-1, existing on the effective date of this Act or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after the effective date of this Act provide the following, or in the case of leases existing on the effective date, shall be construed in conformity with the following:**

[omitted]

**SECTION 3. [omitted]**

**SECTION 4. [omitted]**

**SECTION 5. This Act shall take effect upon its approval.**

**(Approved June 2, 1975)**



**Appendix G**

ACT 186

S.B. NO. 1543

**A Bill for an Act Relating to Residential Leaseholds and the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof.**

*Be It Enacted by the Legislature of the State of Hawaii:*

**SECTION 1.** Findings and purpose. Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

**SECTION 2.** Chapter 516, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read:

**"Sec. 516- Legislative findings and declaration of necessity; purpose. (a)** The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and

who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such in fee simple will alleviate these conditions and will promote the econ-

omy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land value would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility

is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately ben-

efit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act.

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State."

SECTION 3. [omitted]

SECTION 4. [omitted]

(Approved June 2, 1975.)



**Appendix H**

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No. 8489

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In the Supreme Court of the State of Hawaii

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October Term 1982

Civil No. 60945

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Hawaii Housing Authority, a public body and  
a body corporate and politic.  
Plaintiff-Appellee,

vs.

George II Brown, John Cline Mann  
and Napua Stevens Poire,  
Defendants-Appellants,

and

Addison W. Y. Chang, et al.,  
Defendants.

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Appeal from the order granting partial summary  
judgment, filed November 4, 1981  
First Circuit Court

Honorable Arthur S. K. Fong, Judge

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Filed Nov. 10, 1982

Lum, Nakamura, Padgett and Hayashi, JJ.<sup>1</sup>

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<sup>1</sup>Richardson, C.J., recused himself after oral argument. The case is being decided by the remaining justices pursuant to § 602-10, HRS, as amended.

## MEMORANDUM OPINION

This case, like *Hawaii Housing Authority v. Castle, et al.*, No. 8468, decided this day, presents an appeal from an order granting a partial summary judgment determining that a taking of lots in a residential subdivision by the Appellee, Hawaii Housing Authority (HHA), under the provisions of Chapter 516, HRS, was a public use as that term is used in the Fifth Amendment to the Constitution of the United States and in Section 20 (formerly Section 18) of Article I of the Constitution of the State of Hawaii.

Although there are procedural differences in the two cases,<sup>2</sup> we have in this case also, an inadequate record<sup>3</sup>

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<sup>2</sup>Appellants originally raised the issue of lack of public use as a defense in their answer thus literally complying with § 101-34, HRS. Subsequently, they withdrew this defense. Procedural maneuvering followed—in the course of which the Appellee Lessees moved for a partial summary judgment on the issue of public use. Appellants then moved to dismiss the Appellee Lessees as parties and alternatively to amend their answer to reassert the withdrawn defenses. The court below heard the motions together and granted the partial summary judgment but denied the amendment. The denial of the amendment is, of course, not appealable at this stage of the proceedings without some further action by the court below. Appellee Lessees argued that the order granting the partial summary judgment is not appealable under § 101-34, HRS. We, however, look to the substance of what happened below and therefore disagree with that position.

<sup>3</sup>The only statistical evidence before the court below was offered by appellants. The record gives no indication what, if anything, of that nature the legislature considered.

with respect to the evidentiary basis for the legislative findings of fact. On the authority of *HHA v. Castle, supra*, we reverse and remand for a trial upon the issue of public use pursuant to the provisions of § 101-34, HRS.

Reversed and remanded.

DATED: Honolulu, Hawaii, November 10, 1982.

Clinton R. Ashford (Albert I.  
Moon, Jr. and Rosemary T. Fazio  
on the briefs, Ashford & Wriston  
of counsel) for appellants /s/

Yukio Naito, Deputy Attorney  
General, for appellee Hawaii  
Housing Authority /s/

Dennis E. W. O'Connor (I. Nelson /s/  
Rose on the brief, Hoddick,  
Reinwald, O'Connor & Marrack  
of counsel) for defendant Lessees/s/

**Appendix I**

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In The Supreme Court Of The State Of Hawaii

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October Term 1982

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Hawaii Housing Authority, a public body and a body corporate and politic, Plaintiff-Appellee, v. James C. Castle, James Gordon McIntosh, Hawaiian Trust Company, Limited, Hawaii corporation, Defendant-Appellants, and Everett A. Adams, et al., Defendants

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No. 8468

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Appeal From First Circuit Court  
Honorable James H. Wakatsuki, Judge

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(Civil No. 62181)

November 10, 1982

Lum, Nakamura, Padgett and Hayashi, JJ.<sup>1</sup>

[Filed Nov. 10, 1982]

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**JUDGMENT**—on motion or summary proceedings—constitutionality.

In an eminent domain proceeding where the issue of public use is raised by a challenge to the constitutionality of the statute authorizing the condemnation; where that issue is one of first impression; and where it is not clear-cut and simple, a trial as provided by § 101-34, HRS, should be held rather than proceeding by way of summary judgment.

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<sup>1</sup>Richardson, C.J., recused himself after oral argument. The case is being decided by the remaining justices pursuant to § 602-10, HRS, as amended.

*Per Curiam.* This is an appeal under § 101-34, HRS, from an order granting a motion for partial summary judgment, made by Appellee Hawaii Housing Authority and joined in by the Appellee Lessees, determining that the taking by eminent domain in this case was for a public use. We reverse and remand.

The Appellee, Hawaii Housing Authority (HHA), filed this action, pursuant to Chapter 516, HRS, to condemn the reversionary interest of the lessor/landowner appellants in certain residential leasehold lots situate in Maunawili on the Island of Oahu. The principal issues argued in this case relate to the constitutionality of Chapter 516, to wit: whether or not the taking is for a "public use" under the United States and Hawaii Constitutions. The answer to those questions may very well turn upon the sustainability of the findings of fact by the legislature when it enacted and amended Chapter 516. Yet there is a paucity of material bearing on that matter in the record.

In support of the motion for partial summary judgment, Appellee HHA filed in the court below a photostatic copy of a certified copy of findings of fact and conclusions of law with respect to the issue entered in an earlier case involving a different landowner, together with the decision of the United States District Court for the District of Hawaii in a different case involving a different landowner. Obviously, a photostat of a certified copy is not a certified copy and does not comply with Rule 56(e), HRCp. Obviously, also, the decision of the United States District Court in question (which we understand is presently on appeal) may have precedential value with respect to the Constitution of the United States, but has no binding effect on us with respect to the Constitution of the State of Hawaii. Appellants filed nothing in the way of factual material in opposition to the motion for summary judgment. They did file a motion for summary judgment contending that the

statute was facially unconstitutional but no factual showing in support thereof was made.

We are thus being asked to pass upon two questions of vast public import, i.e. whether a taking by eminent domain under the provisions of Chapter 516, HRS, is a "public use" within the meaning of that term as used in the Fifth Amendment to the Constitution of the United States and within the meaning of that term as used in Section 20 (formerly Section 18) of Article I of the Constitution of the State of Hawaii. The record, however, is devoid of any substantial evidence of what the legislature had before it when it enacted what is now Chapter 516 and the amendments thereto.

We are aware that there have been a number of eminent domain actions brought under Chapter 516, HRS. However, the present case and No. 8489 (which was argued the same day) are the first to come before us. The case is therefore one of first impression.

The Supreme Court of the United States said over 30 years ago:

But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . . .

*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57, 68 S.Ct. 1031, 1034, 92 L.Ed. 1347, 1350 (1948). Our decisions have consistently been in accordance with that statement. *Molokai Homesteaders Co-operative Ass'n v. Cobb*, 63 Haw. 453, 457-58, 629 P.2d 1134, 1139 (1981); *Keller v. Thompson*, 56 Haw. 183, 193-94, 532 P.2d 664, 671-72 (1975); *Credit Associates of Maui v. Leong*, 56 Haw. 104, 106, 529 P.2d 198, 199 (1974); *State v. Zimring*, 52 Haw. 472, 475-76, 479 P.2d 202, 204-205 (1970). Section 101-34, HRS, upon which this appeal is based, calls for a trial upon the issue of public use. Since, as we have said, the



case is, with respect to the "public use" issues, one of first impression, we are unwilling to decide the constitutionality of the statute without a trial, pursuant to the statute, being held. Such a trial would give us a record containing evidence together with the findings of fact and conclusions of law of the court below which would greatly aid our consideration of these issues of public importance. We therefore reverse and remand to the circuit court to follow the statutory procedure.

Reversed and remanded.

William C. McCorriston  
(Goodsill Anderson & Quinn of  
counsel) for appellants /s/

Yukio Naito, Special Deputy Attor-/s/  
ney General, for appellee Hawaii  
Housing Authority /s/

Anthony P. Locricchio for defend-  
ant Lessees /s/

**Appendix J**

**United States Court of Appeals for the Ninth Circuit**

**Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,  
Matsuo Takabuki and Myron B. Thompson,  
Trustees of the Kamehameha Schools/Bishop Estate,  
Plaintiffs/Appellants,**

**vs.**

**Paul A. Tom, et al.,  
Defendants/Appellees,**

**and**

**Wai-Kahala Tract "H" Association, Inc., et al.,  
Intervenors-Defendants/Appellees.**

July 14 1980	Docketed cause & entered appearances of counsel. ec
Jul 25	Filed Certificate of Record (1/26/80). ss
Jul 25	Aplt (Midkiff) opening brief due 9/3/80. ss
Aug 12 1980	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Oct 20 1980 kf
Oct 20	Filed orig & 15 aplt's opening briefs & 5 Excerpts. (10/20) ogm
Oct 20	Filed 10 aplt's appendices (Statutes, Rules, Regulations, etc.,) (10/20). ogm
Nov 14 1980	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Jan 21 1981 Sh
Nov 21 1980	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Tom Jan 21 1980 kf

- Nov 24 Fld mtn & ord (dep clk) granting Int/aples Kahala Comm Assoc & Kahala Comm Fee Purch Fund's an ext of time to file brief to Jan 21, 1981.—kf—
- Nov 24 Fld mtn & ord (dep clk) granting Int/aple Wai-Kahala Tract H an ext of time to file brief to Jan 21, 1981.—kf—
- Nov 25 Fld mtn & ord (dep clk) granting Int/aple Halawa Valley Estates an ext of time to file brief to Jan 21, 1981.—kf—
- Jan 13 1981 Fl mtn & ord (Clk) gtng Aple (Paul A. Tom, et al.,) ext of time to fl their Answering brief to: 2-20-81. bbm
- Jan 16 Fld mtn & ord (Clk) gtng Intervenors-Aples (Wai-Kahala Tract "H" Assoc., et al.,) ext of time to fl their brief to: 2-20-81. bbm
- Jan 20 R'cvd as of 1/19, orig & 15 intervenor/aples' briefs (Portlock Community Association, Kokohead Community, etc.,); no proof of service; no Rule 13 (e & j); notified counsel by letter. ogm
- Jan 27 Fld mtn & ord (Clk) gtng Interven.-Aples (Kahala Community Assoc. & Kahala Community Fee Pur. Fund) ext of time to fl brief to 2-20-81. bbm
- Jan 29 Filed as of 1/19, orig & 15 intervenor/aples' briefs (Portlock Community Asso., et al., (1/19/81); deficiencies corrected. ogm
- Feb 9 Fld mtn & ord (Clk) gtng Aplts (Frank E. Midkiff & et al.,) an ext of time to file Reply brief to: 3-9-81. bbm

- Feb 23 Filed orig & 15 Int/Aple (Wai-Kahala Tract "H" Ass'n) ans brief (2/20). pf
- Feb 23 Filed orig & 15 Int/Aple (Kahala Community Ass'n) ans brief (2/20). pf
- Feb 24 Filed orig & 15 Aple's (Tom et al.) ans brief (2/20). pf
- March 9 Filed aplts' motion for first and second exts of time in which to file reply brief with affidavit of Clinton R. Ashford in support of. (Civatt) 3/5—rmc—
- March 12 Filed order (Mo Atty) aplts are granted an ext of time to and including April 23, 1981 in which to file their reply briefs. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order. —rmc—
- March 26 Filed as of 7/25/80 Cert Record on Appeal in Fourteen Vols, Pldgs, Vol I-IV copy R/T Vol V-XIV orig pv
- Apr 24 Filed as of 4/23, orig & 15 aplts' reply briefs. (4/23) ogm
- Oct 13 Filed motion of intervenor-appellees (Kahala Community Association, Inc. & Kahala Community Purchase Fund) for add'l time for oral argument to (panel). jr 10/9/81
- Oct 13 Rec'd aplts' letter of add'l authority to (panel). jr
- Oct 16 Filed order (Poole) pursuant to the motion for add'l time for oral argument filed on 10/13/81, by intervenor aples, Kahala Community Association, Inc. and Kahala Community Purchase Fund, an add'l 10 minutes oral argument will be allocated to each side. jr

- Oct 21 Argued Before: Alarcon, Poole & Ferguson; CJJ. Ordered from the bench: aplt's counsel will submit a letter brief 7 days from today. Apels' counsel will submit a response 7 days after receipt of aplt's letter brief. Submission deferred until Tuesday, November 3, 1981.
- Oct 30 Rec'd aplt's letter brief requested by court during oral argument to (panel). jr 10/28/81
- Oct 30 Rec'd aples' letter brief requested by court during oral argument to (panel). jr 10/28/81
- Oct 30 Rec'd, as of 10/19/81, intervening aples' (Portlock) letter of 10/14/81 re: errors in the Table of Authorities to (panel). jr
- Nov 3 Rec'd, as of 10/20/81, intervenor's (Kahala Community, et al) letter of add'l authorities to (panel). jr
- Nov 3 Recvd as of Oct. 30 aples' letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Recvd as of Oct. 30 intervenor-ables' (Wai-Kahala Tract "H" Assoc., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Recvd as of Nov. 2 intervenor-ables' (Kahala Community Assoc., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Cause submitted for decision pursuant to minute order of 10/21/81. jr

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Nov 9	Recvd letter dated Nov. 4 from Rosemary T. Fazio, counsel for apts, re: reply to aples' letter briefs previously recvd. (Panel) 11/4. ag
Dec 10	Recvd letter dated Dec. 7 from Dennis O'Connor, counsel for Intervenor-Aple's Wai-Kahala Tract "H" Assn), re: additional citations. (Panel) 12/9. ag
Dec 17	Recvd letter dated Dec. 15 from Clinton R. Ashford, counsel for apts, re: response to Intervenor-Aple's add'l citations. (Panel) 12/15. ag
1983	
March 29	Recvd intervenor-apes' (Wai-Kahala Tract "H" Assoc., et al.) supplemental letter brief per ct's request at oral argument. (Panel) 3/25. ag
Mar 28	Ordered opinion (Alarcon) Poole concurring & Ferguson dissenting filed & judg to be filed & entd.
Mar 28	Filed Opinion—Reversed & Remanded.
Mar 28	Filed & Entered Judgment. sz
Mar 31	Filed Aplt's Emergency Motion for Preliminary Injunction Pending Issuance of Mandate. 3/30 Panel EM
Apr 1	Filed Aple's Memorandum in Opposition to Emergency Motion for Preliminary Injunction pending appeal; Affidavit of James Case, Dennis O'Connor, and A. Bernard Bays. 3/31 Panel EM
Apr 1	Filed Aplt's Supplemental Memorandum in support of Emergency Motion for preliminary injunction. 3/31 Panel EM



- Apr 5 Filed Intervenor-Appellees Motion in opposition to emergency motion for preliminary injunction pending issuance of mandate; and Withdrawal and Appearance of Counsel. 4/4 Panel EM
- Apr 5 Filed Deft-Aple's (Hawaii) Opposition to Aplt's Emergency Motion for Preliminary injunction pending issuance of mandate. 4/4 Panel EM
- Apr 5 Filed Order (Alarcon, Poole and Ferguson, CJJ) Pending a ruling on aplt's emergency motion for injunctive relief, appellees Hawaii Housing Authority, its agents and representatives, and all those acting in concert with it are restrained from further prosecuting *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, in the First Circuit Court of the State of Hawaii. At oral argument to be held by a telephone conference call, appellees shall show cause why aplt's motion should not be granted and appellees be required to take all steps necessary to terminate the state proceedings. The parties will be notified subsequently of the time and date of oral argument. Judge Ferguson dissenting. (Case file) ogm
- Apr 6 Filed Intervenor/Appellees' (Kahala Community Assoc., et al.) motion for oral argument and suggestion for hearing en banc on pltfs/aplts emergency motion for preliminary injunction pending issuance of mandate; memorandum in support thereof. 4/5 (Panel) ogm

- Apr 6 Filed Intervenor's/Appellees' (Wai-Kahala Tract "H" Assoc., et al.,) motion for personal appearance and oral argument and suggestion for hearing en banc and aplt's emergency motion to enjoin parties to Hawaii State Court Proceedings. (Panel) 4/5 ogm
- Apr 6 Filed Affidavit of Dennis E. W. O'Connor in opposition to emergency motion for preliminary injunction pending issuance of mandate. (Panel) 4/5 ogm
- Apr 6 Filed deft/appellees' (Hawaii, et al.,) motion for personal appearance at oral argument and suggestion for hearing en banc on apmts' emergency motion to enjoin ongoing Hawaii State Court Proceedings; Affidavit of George R. Ariyoshi. (Panel) 4/5 ogm
- Apr 6 Filed Orig & 33 Intervenors'/Appellees' (Wai Kahala Tract "H" Assoc., et al.,) Petition for Rehearing and Suggestion for Hearing En Banc. (Panel, active judges) 4/5 ogm
- Apr 6 Filed Order (Alarcon, Poole & Ferguson) Aples' request to hold the hearing directed by the court's April 5, 1983 order in person rather than by a telephone conference call is granted. Argument will be held in S.F. on Apr 14, 1983 at 1:30 p.m. Pacific time. No later than Apr. 12, 1983, the parties may file supplemental materials addressing the issues raised by apmts' emergency motion for injunctive relief. In addition to filing these materials with the clerk in S.F., copies may be sent directly to the chambers of the members of the panel. js

- Apr 08 Filed Orig & ee Intervenor-Appellees  
[Kahala Comm. Assoc., Inc., et al] Peti-  
tion For Rehearing and Suggestion of  
Rehearing En Banc. 4/7 (Panel & Active  
Judges) -ot-
- Apr 11 Filed Intervenor-Aple's Memorandum in  
opposition to aplts Emergency Motion  
for Preliminary Injunction Pending Is-  
suanace of Mandate; 4/11 Panel EM
- Apr 11 Filed State of Hawaii's Appendix and Ex-  
hibits in Opposition to Aplt's Emergency  
Motion for preliminary Injunction. 4/11  
Panel EM
- Apr 11 Filed Aples' [Hawaii] Petition For Re-  
consideration And Suggestion For Re-  
hearing En Banc. 4/8 (Panel & Active  
Judges) -ot-
- Apr 11 Filed Intervenor-Aples [Portlock Com-  
munity Assoc., Kokohead Community  
Lease-Fee, Inc.; West Marina Com-  
munity Assoc.; and Hahaione Vly Com-  
munity Assoc] Petition For Rehearing  
Suggestion of Appropriateness of Re-  
hearing En Banc. 4/10 (Panel & Active  
Judges) -ot-
- Apr 12 Filed Pltfs'/Aplts' Reply Memorandum in  
support of the emergency motion; Affi-  
davit and Exhs. A thru F, attached  
thereof. (Panel) 4/12 ogm
- Apr 12 Filed Intervenor/Aples' Supplemental  
memorandum in opposition to emer-  
gency motion for prel. injunction pend-  
ing issuance of mandate. (Panel) 4/11  
ogm

- Apr 12 Filed Hawaii's Supplemental Memorandum in opposition to aplt's emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm
- April 13 Filed amicus curiae, Acting Chief Justice (Herman T. F. Lum) and Acting Administrative Head of the judiciary of the State of Hawaii, memorandum in opposing the issuance of federal injunctive relief against state court proceedings in the instant case. gb (4/12) (Panel) w/cover letter
- Apr 14 Filed aplt's Motion to strike Appendix "A" to deft-aples' Memorandum in opposition to Pltff-aplt's Emergency Motion. 4/13 Panel em
- Apr 14 Filed ORDER (Alarcon and Poole) vacating filing of forty exhibits attached to affidavit of Michael A. Lilly. Documents may be lodged with the court subject to later determination as to whether any of the items should become part of the record. c2
- Apr 14 Filed Aplt's Bill of Cost. 4/11 -ot-
- Apr 14 Argument on aplt's emergency motion for injunctive relief before: Alarcon, Poole and Ferguson. c2

- Apr 14                      Filed Order (Alarcon, Ferguson and Poole, CJJ) The motion for an injunction directing the parties to stay further prosecution of the matter entitled Hawaii Housing Authority, Plaintiff, v. Frank E. Midkiff, et al., Defts, now pending in the Circuit Court of the First Circuit, State of Hawaii, at Civil No. 63408 thereof, is denied. The order to show cause is vacated and the stay heretofore entered is dissolved. All parties to bear their own costs of this appeal.  
ogm
- APR 15                      Filed Order (Chief Dep Clk) The motion of Herman T. F. Lum, Acting Administrative Head of the Judiciary of the State of Hawaii, to file an amicus curiae memorandum is granted. The motion of aples' for a hearing en banc on aplt's emergency motion for an injunction is denied. The final word of the order filed Apr 14, 1983 denying the injunction is changed from "appeal" to proceeding."  
js
- Apr 21                      Filed Intervenor's-Aple's objection to the Bill of Cost. 4/20 -ot-
- Apr 27                      Filed intervenor's-able's, (Kamiloiki Community Assos.), Motion for order lodging exhibits one through forty attached to the affidavit of Michael A. Lilly as an appendix; Affidavit of Theodore Y. Uyeno; exhibit "A". 4/25 Panel sz
- Apr 27                      Recv'd from the office of the Atty. Gen. of Hawaii, Appearance of counsel Laurence H. Tribe as counsel of record for the defendant/appelles Paul A. Tom, T. Taniguchi, et al.  
sz

Apr 28	Filed Aplt's Memorandum In Support of Plaintiffs-Aplt's Bill of Cost. 4/26
Apr 28	Filed Hawaii's Objection To Bill of Costs. 4/26
May 02	Filed Memorandum In Opposition To Hawaii's Objection To Bill of Costs of Plaintiffs-Aplt's. 4/28 -ot-
May 02	Filed Joinder In Objection To Bill of Costs of Bishop Estate. 4/28. -ot-
May 02	Filed (Inter/Aple Halawa Vly) Joinder In Objection To Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed Aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. 4/29 Panel sz
May 03	Filed Joint Motion To Withdraw Petition For Rehearing And Suggestion For Re- hearing En Banc And An Application To Stay The Mandate Pending An Appeal To The United States Supreme Court Pursuant To 28 U.S.C. § 1254(2). 4/29 (Panel) -ot-
May 04	Filed Memorandum In Opposition To In- tervenors-Aples' Objection To Bill of Costs of Plaintiff-Aplt's. -ot-
May 6	Recv'd lrt dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is profes- sor Tribe. sz
May 09	Filed Aplt's Memorandum Opposing Joint Application To Stay The Mandate. 5/6 (Panel) -ot-



- May 17 Filed Order (Alarcon, Ferguson, Poole, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
- June 8 Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
- June 13 Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenor/Appellees. (pw)
- June 15 Filed Intervenor-Aples' Notice of Withdrawal of Joint Motion To Withdraw Petition For Rehearing And Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-
- June 17 Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm

May 2	Filed Memorandum in Opposition to Hawaii's Objection to Bill of Costs of Plaintiffs-Appls'. 4/28. -ot-
May 2	Filed Joinder in Objection to Bill of Costs of Bishop Estate. 4/28. -ot-
May 2	Filed (Inter/Aple Halawa Vly) Joinder in Objection to Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. (4/29) (Panel) sz
May 3	Filed Joint Motion to Withdraw Petition for Rehearing and Suggestion for Rehearing En Banc and an Application to Stay the Mandate Pending an Appeal to the United States Supreme Court Pursuant to 28 U.S.C. § 1254(2). 4/29 (Panel) -ot-
May 4	Filed Memorandum in Opposition to Intervenor-Aples' Objection to Bill of Costs of Plaintiff-Appls. -ot-
May 6	Recv'd ltr dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is Professor Tribe. sz
May 9	Filed Appls' Memorandum Opposing Joint Application to Stay the Mandate, 5/6 (Panel) -ot-

May 17	Filed Order (Alarcon, Ferguson, Poole, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
June 8	Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
June 13	Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenor/Appellees. (pw)
June 15	Filed Intervenor-Aples' Notice of Withdrawal of Joint Motion to Withdraw Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-
June 17	Filed Order (Alarcon, Ferguson, Poole, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm
June 27	Mandate Issued.

June 27	Filed Motion for Award of Plaintiffs-Appellants' Attys' fees or for Remand with Directions to Ward Fees. 6/24 (CIVATT) -ot-
July 11	Filed Joint Defendants-Appellees' and Intervenor-Appellees' objection to Plaintiff-Appellants' Application for Attorneys' Fees and Memorandum of Points and Authorities in Support of Objections. 7/8 (CIVATT) -ot-
July 11	Filed Intervenor-Appellees' [Kahala Community, Etc., Et Al.] Opposition to Plaintiffs-Appellants' Motion for Award of Attys' Fees. 7/8 (CIVATT) -ot-
July 13	Filed Aplts' Reply Memorandum in Support of Plaintiffs-Appellants' Motion for Award of Attys' Fees. 7/12 (CIVATT) -ot-
July 15	Rec'd Intervenor-Apples' Notice of Appeal to the Supreme Court of the United States. 7/14 -ot-
July 15	Rec'd Apples' Notice of Appeal to SC. 7/14 -ot-

**Appendix K**

In the Circuit Court of the First Circuit  
State of Hawaii

Civil No. 47103

Frank E. Midkiff, et al.,  
Plaintiffs,

vs.

Ronald Y. Amemiya,  
Attorney General of the State of Hawaii, et al.,  
Defendants.

[Filed June 29, 1978]

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiffs are Trustees of the Estate of Bernice Pauahi Bishop and have filed this Complaint for Declaratory Judgment and for Instructions on December 29, 1975.

The Hawaii Housing Authority is named as defendant and the Director of the Department of Social Services and Housing, the Commissioners of the Hawaii Housing Authority, the Executive Director of the Hawaii Housing Authority, and the Special Assistant for Housing are all named as defendants because of their connection with the Hawaii Housing Authority.

The Attorney General is named as a defendant because he is authorized to represent the interests of the public in matters concerning the administration of trust estates established for charitable and educational purposes, including the Estate of Bernice Pauahi Bishop (hereinafter referred to as the "Bishop Estate").

The remaining defendants are lessees of certain residential lots owned and developed by the Trustees in Tract "A", Waialae Neighborhood Subdivision, Waialae-Nui, in

the City and County of Honolulu, State of Hawaii (hereinafter referred to as "Tract A"), or their vendees under Agreements of Sale.

The Trustees have issued leases to the lessees in the Tract A subdivision which have a term of 55 years which commenced on January 1, 1951. The annual lease rent was fixed for an initial 25 year period and is to be renegotiated for the final 30 year period. The initial fixed rent period under these leases ended on December 31, 1975, and the defendants-lessees had not renegotiated their annual rent with the Trustees prior to that date.

Act 185, 1975 Session Laws of Hawaii (hereinafter referred to as "Act 185"), establishes guidelines and places certain limitations on the rent which can be charged by the Trustees on renegotiation and names the Hawaii Housing Authority or its designee as arbitrator in the event the parties cannot agree on the annual rent. In their Complaint, the Trustees have asked this Court to enter a declaratory judgment that Act 185 is unconstitutional as applied to these leases and for instructions as to their responsibilities with respect to the determination of the annual lease rent for the final 30 year period of these leases.

This case came on for trial before the Court on July 18 through July 22 and July 25 through July 28, 1977, and the Court having considered all of the stipulations, testimony, exhibits and other evidence received at the trial of this matter and all of the legal memoranda of counsel, including the proposed findings of fact and conclusions of law submitted by counsel, and the transcripts of the trial, hereby makes the following findings of fact and conclusions of law as follows:

#### FINDINGS OF FACT

1. Plaintiffs have failed to meet their burden of disproving the legislative findings and purposes in Section 1, Act 185, Session Laws of Hawaii 1975.



2. The Court reaffirms the legislative findings and purposes in Section 1, Act 307, Session Laws of Hawaii 1967 and Act 185.

3. In Act 307, the legislature found that:

(a) A prime goal in the United States is the promotion of public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

'All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . .'

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the mon-

archical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a

choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which

vitality affect the economy of the State and the public interest, health, welfare, security and happiness.

4. In Act 185, the legislature found that:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been

leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership 'is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical'.

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of

leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.



Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who

has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare, and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated, above, the public health, safety and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

## I. PARTIES

5. Plaintiffs Trustees are all residents of the City and County of Honolulu, State of Hawaii, and are the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, a trust estate created for charitable and educational purposes.

6. Defendant Ronald Y. Amemiya is the Attorney General of the State of Hawaii and in his official capacity, he is authorized to represent the interest of the public in matters concerning the administration of trust estates established for charitable and educational purposes, including the Bishop Estate.

7. Defendant the Hawaii Housing Authority is a public body corporate and politic with perpetual existence organized and existing under the laws of the State of Hawaii.

8. Defendants Alan B. Kidwell, Paul A. Tom, Walter E. Whitcomb, Tony Taniguchi, B. Martin Luna and Nobuyoshi Tamura are the six public commissioners of the Hawaii Housing Authority.

9. Defendant David C. Slipher is the Special Assistant for Housing appointed by the Governor of the State of Hawaii and is also an ex officio additional voting commissioner of the Hawaii Housing Authority.

10. Defendant Andrew I. T. Chang is the Director of the Department of Social Services and Housing, State of Hawaii, and is the official having administrative control over the Hawaii Housing Authority, and is an ex officio additional voting commissioner of the Hawaii Housing Authority.

11. Defendant Franklin Y. K. Sunn is the Executive Director of the Hawaii Housing Authority.

12. The remaining individual defendants are each lessees of a residential lot or lots owned by the Trustees and located in Tract A, or are vendees under Agreements of Sale of the lessee's interest in a residential lot or lots owned by the Trustees and located in Tract A, and are all residents of the City and County of Honolulu, State of Hawaii.

## II. BISHOP ESTATE

13. The Bishop Estate with the Kamehameha Schools as its sole beneficiaries is deemed a tax-exempt educational trust by the United States Internal Revenue Service. The income derived by Bishop Estate from its substantial landholdings and other investments is not subject to income tax. Except for expenses incurred in administering

the Estate, the income is available to operate and maintain the Kamehameha Schools.

14. As of June 30, 1975, approximately 342,000 acres remain as part of the corpus of the trust. These lands are located on five islands as follows:

	<u>Acres</u>	<u>Percent</u>
Oahu .....	56,581	16.53
Maui .....	4,695	1.37
Molokai .....	2,541	.74
Hawaii .....	266,716	77.93
Kauai .....	11,726	3.43
	<u>342,259</u>	<u>100.00</u>

15. As of June 30, 1975, in terms of land use classification, the land holdings are held in the following uses:

	<u>Acres</u>	<u>Percent</u>
Residential .....	5,521	1.61
Commercial .....	978	.29
Unimproved Urban .....	3,059	.89
Agricultural .....	166,147	48.55
Conservation .....	166,554	48.66
	<u>342,259</u>	<u>100.00</u>

16. As of June 30, 1975, in terms of land use classification, the land holdings are held in the following uses by island:

<u>OAHU</u>	<u>Acres</u>	<u>Percent</u>
Residential .....	5,159.9	9.12
Unimproved Residential .....	2,381.5	4.21
Commercial .....	188.9	.33
Hotel, Apartment and Resort .....	446.9	.79
Industrial .....	221.2	.39
Agricultural .....	16,641.4	29.41
Conservation .....	31,541.5	55.75
	<u>56,581.3</u>	<u>100.00</u>

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<u>HAWAII</u>	<u>Acres</u>	<u>Percent</u>
Commercial .....	12.8	—
Hotel, Apartment and Resort .....	88.1	.03
Industrial .....	17.8	—
Residential .....	357.4	.14
Agricultural .....	144,037.2	54.01
Conservation .....	121,539.1	45.57
Unimproved Residential .....	663.1	.25
	<u>266,715.5</u>	<u>100.00</u>
<u>MAUI</u>		
Hotel, Apartment and Resort .....	3.1	.12
Industrial .....	1.7	.07
Agricultural .....	1,220.3	48.02
Conservation .....	1,302.0	51.24
Unimproved Residential .....	13.9	.55
	<u>2,540.9</u>	<u>100.00</u>
<u>MOLOKAI</u>		
Residential .....	1.1	.03
Agricultural .....	3,134.4	66.76
Conservation .....	1,559.4	33.21
Unimproved Residential .....	—	—
	<u>4,694.9</u>	<u>100.00</u>
<u>KAUAI</u>		
Agricultural .....	1,113.4	9.50
Conservation .....	10,612.1	90.50
	<u>11,725.5</u>	<u>100.00</u>

17. About 2 percent of the total land holdings (in acres) produce 80 percent of the gross revenues of the Bishop Estate and the remaining 98 percent produce 13 percent of the gross revenues. About 7 percent of gross revenues is produced from other sources.

18. Residential leases provide 33 percent of the gross revenues, and industrial, commercial and hotel apartment leases, combined, produce 47 percent of the gross revenues.

19. Bishop Estate is the largest private owner of land on Oahu and its position has remained relatively unchanged over the past 16 years because it has sold very little land in fee simple.

20. Bishop Estate has not provided any land for single-family residential fee simple subdivisions on Oahu from 1950 up to the time of the trial of this action.

21. There are in excess of 17,800 leases covering single-family residential properties owned by Bishop Estate.

22. From 1950 to 1975, 14,408 leasehold single-family residential lots were developed on land owned by Bishop Estate.

23. From 1950 to 1959, a total of 1,468 leasehold single-family residential lots were developed on Bishop Estate land, or an average of approximately 147 leasehold lots per year. A total of 7,579 leasehold single-family residential lots were developed from 1960 to 1969, an average of 758 lots per year. 5,361 leasehold lots were developed from 1970 to 1975, an average of 893 lots per year.

24. During the 1950's, Bishop Estate leasehold land accounted for approximately 4.6% of the newly developed single-family housing units on Oahu, 40% during the 1960's, and 50% of such development from 1970 to 1975.

25. From 1961 to 1974, most of the single-family housing units developed in the urban corridor of Honolulu, an area extending from the Diamond Head side of Pearl Harbor to Koko Head, were developed on land leased from Bishop Estate.

26. At a meeting held in March 16, 1967, the Trustees voted to approve a statement "that the Trustees, in principle, support legislation to increase fee simple ownership of lands and to assure fair treatment of lessees."



27. From 1967 to 1975, Bishop Estate did not sell any substantial number of its existing leasehold single-family residential properties in fee to its lessees or to anyone else.

28. From 1967 to 1975, the purposes of Act 307 as they related to Bishop Estate were not attained. Bishop Estate lessees were generally not able to acquire the fee interest in their residential lots and the development of new leasehold subdivisions on Bishop Estate land was actually accelerated and, as a result, new single-family housing in the suburbs around Honolulu generally became even more predominantly leasehold.

29. To maintain its tax exempt status, Bishop Estate has sought and has never been denied approval of the Internal Revenue Service to sell land in fee simple and Bishop Estate has recently requested and has been granted permission by the Internal Revenue Service to sell single-family residential properties in fee simple.

30. In 1968, the Bishop Estate staff stated in a report to the Trustees that if condemnation actions under Act 307 were initiated, it would be important for Bishop Estate to have the highest possible lease rents in effect.

31. Rental policy for Bishop Estate leaseholds is established by the Trustees. The Trustees can unilaterally change its policy regarding rent renegotiation at any time.

32. Lease rents on extensions or renegotiations are quoted by the Bishop Estate staff in accordance with existing Trustee policy or by direction from the Trustees. Edwin Michatel, the Bishop Estate area development manager responsible for residential leaseholds in the Waialae-Maunaloa-Koolaupoko areas could recall only one instance in his five years as manager where the lessee disputed the quoted lease rent on renegotiation and there was an actual give and take negotiation between the lessee and the Trustees.

33. Initial lease rents in new subdivisions on Bishop Estate lands are based on "marketability" and other factors and not on the formulas set by the Trustee to quote rents for extension or renegotiation.

34. In May 1960, when no significant lot development charge was paid by its lessee, the Trustees adopted a policy for quoting rents for lease extension or renegotiation at 3% of the full market value of the improved lot with no credit to the lessee for offsite improvements or lot development costs actually paid for by the lessee.

35. Offsite improvements and lot development costs paid by the lessee can be twice as much as the value of the unimproved land and in some land fill situations, the Trustees' actual equity in the improved lot may be as low as 10%.

36. A chart attached to the Bishop Estate staff report dated January 23, 1968, graphically demonstrates the advantage of having the lessee pay for offsite improvements and lot development costs where the Trustees were able to charge rents based on the investment by the lessee in offsite improvements and lot development costs and the appreciation in the value of those items.

37. In 1962, the Trustees adopted a policy giving lessees credit for 75% of the remaining fixed rent when they extend or renegotiate their lease rent early. The Bishop Estate staff considers granting of lessee's rental credit an important stimulant to frequent renegotiation of lease rent. Since renegotiation is the most significant factor in increasing revenue for the Trustees, the Bishop Estate staff pointed out to the Trustees that it was important that Bishop Estate's policy encourage early renegotiation of rent.

38. On October 5, 1965, the Trustees for the first time adopted a policy of giving the lessee some credit for offsite

improvements and lot development costs by giving him credit for the original cost of such improvements amortized over 55 years.

39. Offsite improvements generally do not actually depreciate over time because their replacement cost increases and because they are maintained in a relatively depreciation-free condition by government maintenance which is paid for in part by property taxes which are paid by the lessee.

40. In 1968, the Bishop Estate began studying its residential leasehold policy for the primary purpose of increasing Bishop Estate income. In a staff report dated September 19, 1968, the Bishop Estate staff recommended that the lease rents quoted for lease extension or renegotiation be increased from 3% to 3.6% or to a maximum of 4% and concluded that major changes in the lease rent policy of a major landowner like Bishop Estate could have serious consequences on the state's economy and that rental increases to more than 4% would be likely to disrupt property values and arouse public indignation.

41. In response to these staff recommendations, the Trustees voted at a meeting held on September 24, 1968 to increase the lease rent rate to be quoted on lease extension or renegotiation from 3% to 4.28% for 30 year fixed rent leases.

42. In 1969, the Trustees commissioned reports from independent consultants regarding its residential leasehold rent policy. Economic Research Associates (hereinafter referred to as "ERA"), a mainland company, submitted a report to the Trustees dated September 10, 1969, which recommended that lessees be given credit at the time of renegotiation for a proportionate share of appreciation based upon the initial ratio of offsite improvements and lot development costs of unimproved lot value at the inception of the lease and that the initial market value of the

raw land be used as a base for setting lease rents throughout the duration of the lease.

43. In 1969, Gilbert Root, a local appraiser who testified at the trial, was retained by Bishop Estate to advise the Trustees in connection with a review of their residential leasing policy. He strongly recommended the so-called "Irvine Ranch formula" which allocates the current value of the leasehold land based on the proportion of the offsite improvements and lot development costs actually paid for by the lessee and the value of the unimproved land provided by the lessor. Mr. Root told the Trustees that their investment in residential leaseholds would result in a 9% composite yield, assuming a 30 year fixed rent period, a 5% annual rate of appreciation in value of the improved lot, and annual rental set at 4% of the basis computed using the Irvine Ranch formula. Mr. Root admitted on cross-examination that over a period of time, the owner's basis definition contained in Act 185 and the Irvine Ranch formula would yield about the same results.

44. The Bishop Estate staff objected to Mr. Root's formula because they thought it would require a double appraisal of the property.

45. In a staff report dated March 12, 1970, the Bishop Estate staff stated that the 4.28% return adopted in 1968 was a rather arbitrary figure and recommended to the Trustees that it be rounded down to 4% or up to 4.5%.

46. In that report dated March 12, 1970, the Bishop Estate staff, after careful consideration, developed an alternative which would give the lessee full credit for lot development costs paid for by him, plus 2% appreciation per year on the cost of those improvements as a compromise between credit for the full original cost of lot development costs and the Irvine Ranch formula. They also recommended a 100% rental credit for the remaining fixed rent on leases with a 30 year fixed rent period. In consideration of these two credits to the lessee, the Bishop

Estate staff recommended that the annual lease rental rate be rounded up to 4.5%.

47. Later in 1970, the Bishop Estate staff recommended that the annual lease rental rate be rounded down to 4% because it still exceeded the "true interest rate" of 3% in excess of inflation which would be expected on a secure investment and because the effects of inflation on residential leasehold would be counterbalanced in favor of the Trustees by appreciation in the leasehold land that occurs in practically all leasehold property.

48. On January 5, 1971, the Trustees rejected the staff recommendations that the lessee be given credit for the cost of offsite improvements and lot development costs paid for by him with appreciation at 2% per year and 100% rental credit for the remaining fixed term, but went ahead and increased the annual lease rental rate from 4.28% to 4.5%. The 4.5% rental rate was still the annual rental rate in effect under the Trustees' current policy at the time of trial.

49. From February 24, 1972, up to the time of trial, the Trustees' policy on renegotiation has been to give the lessee credit at original cost for offsite improvements paid for by the lessee with no appreciation.

50. On July 24, 1973, the Trustees adopted a new policy for lease extensions which provided for a new term of 55 years with rental fixed for the first 25 years and annual rents based on a 4% rate for the first 15 years with a 50% stepup for the following 10 years with the provision that rent for the next 10 years shall not exceed the rent for the fifteenth year of the new lease term increased in the same proportion as any net increases in the Honolulu Consumer Price Index over the 15 year period.

51. On July 24, 1973, the Trustees adopted a policy requiring lessees to pay \$50 to obtain a firm commitment from Bishop Estate stating the new rent offered for extension of their lease. The quotations did not require any

actual appraisals except in exceptional cases and were simply based on computations using a multiplier of tax assessed values. The lessees had to pay the \$50 in advance even if they did not accept the rent quoted by Bishop Estate.

52. Beginning in 1973, the Bishop Estate staff recommended a number of policy changes designed to alleviate the hardship to lessees caused by increased lease rents. One such recommendation was to quote rent at a 3% rate initially, with a 50% stepup after 15 years where the lessee was not interested in a 55 year extension. The Trustees deferred action on these various recommendations and none were ever adopted.

53. The Trustees adopted a policy on June 3, 1975, giving the lessee a 100% rental credit for remaining fixed rent to encourage early extension and rent renegotiation.

54. In a Bishop Estate staff report dated August 12, 1975, the staff evaluated the potential effects of Act 185 which had been passed by the legislature and concluded that for the next 8 years or so, Act 185 would have little effect on the new rent to be quoted for the first 15 years since the essential difference between current practice and that prescribed by Act 185 is a relative credit allowed for development cost paid by the lessee. Accordingly, the staff recommended that Bishop Estate go ahead and quote rent at 4% of owner's basis as defined in Act 185 with the condition that if an extension is subsequently requested and granted, there would be no rental credit given to the lessee.

55. Although the Trustees ostensibly adopted this recommendation of the staff to follow Act 185 on August 12, 1975, the rent offered for renegotiation in the letters sent to the Tract A residents was computed in accordance with the Trustee policy established on January 5, 1971, and without regard to Act 185.



56. The alternative for extension to a new 55 year lease was offered in accordance with Trustee Policy L 413 except that the Honolulu Consumer Price Index ceiling was deleted.

57. On May 6, 1976, the Trustees suspended all quotation of rents for requested extensions in Waialae-Kahala and cancelled all overdue, outstanding offers for residential lease extensions and maintained this policy up to the time of trial.

### III. TRACT A

58. Tract A is a single-family residential subdivision located adjacent to the Kahala Mall Shopping Center in Waialae-Kahala. Waialae-Kahala is a suburban neighborhood which is primarily single-family residential located just east of Diamond Head and in relatively close commuting proximity to downtown Honolulu.

59. Waialae-Kahala is situated in what is sometimes called the urban corridor of Honolulu.

60. Archibald C. Camp and his wife, Margaret, were original purchasers in Tract A and their lease is attached as an exhibit to the Complaint in this case.

61. Prior to the development of Tract A, there was only one road through the area, and the land was used for growing vegetables and raising chickens and pigs.

62. Before moving to Tract A, Mr. Camp owned a fee simple lot in Manoa and had plans drawn for a house, but could not get financing to build the house because Honolulu financial institutions didn't have enough money for such financing. Financing for homes in Tract A was pre-arranged through Prudential Insurance Company on the mainland and there appeared to be a heavy demand for property with this type of financing.

63. Each lot in Tract A was prepackaged with a house following one of several designs which had been assigned to that lot.

64. The Camp house was constructed on a concrete slab laid on a pad bulldozed out of the coral head. It was single wall construction of Grade C fir and contained two bedrooms and one bath and cost \$12,500. Included with Mr. Camp's house was \$50 worth of landscaping. Mr. and Mrs. Camp also paid an additional lot development charge of \$850.

65. The Camp lease which is dated January 1, 1951, provided for an annual rental of \$116 per year for the first 18 years and \$260 per year for the next 7 years with rent to be renegotiated at the end of the initial 25 year fixed term which expired on December 31, 1975. The other leases in Tract A bore similar dates, contained identical terms and provided, on the average, for a rental of \$120 per year for the first 18 years of the lease and \$269 per year for the next 7 years of the lease with rent to be renegotiated at the end of the initial 25 year fixed rent period at "such annual rent as shall be mutually agreed upon by the Lessors and the Lessee. . . ."

66. The Tract A leases provided as follows with respect to rent renegotiation in the event of failure to reach an agreement:

That in the event the Lessors and the Lessee shall fail to reach an agreement before the end of the twenty-fifth (25th) year of said term in the matter of the annual rental payable hereunder for and during the last thirty (30) years of said term, then and in such case the annual rental shall be the fair and reasonable annual rental of the land hereby demised (exclusive of buildings) as shall be determined by three arbitrators, who shall be recognized real estate appraisers, one to be appointed by each of the parties hereto, and

either party may give to the other written notice of a desire to have an arbitration of the matter and name therein one of the arbitrators, whereupon the other party shall within ten (10) days after the receipt of such notice, name another arbitrator and give notice thereof to the party seeking arbitration, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to the person then sitting as the senior judge in service of the Circuit Court of the First Judicial Circuit, requesting him to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator and give notice thereof to the Lessors and Lessee, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator, fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter in question, and the decision of any two of them shall be final, conclusive and binding upon both parties and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 165, Revised Laws of Hawaii 1945, or as the same may be amended or reenacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein; provided, however, that in the event two of the above three arbitrators shall fail to reach an agreement in the determination of the matter in question, the matter in question shall be decided by three new arbitrators, who shall likewise be recognized real estate appraisers, and who shall be appointed in the same manner aforesaid, and this process shall be repeated until a decision is finally reached by two of the arbitrators; and provided,

further, that the parties hereto shall each pay for the services of its own appointee and one half of all other legitimate costs of said arbitration, other than attorneys' fees and witness fees;

67. The Tract A leases did not specify the method by which lease rent after the expiration of the initial fixed rent period of 25 years was to be computed, but provided only that the annual rental was to be "the fair and annual rental of the land."

68. The Tract A leases provided in paragraph two, that the lessee was to pay all taxes and assessments on the property:

2. PAYMENT OF TAXES, ASSESSMENTS, ETC. That he will also pay, when and as the same become due and payable, all taxes, rates, assessments, charges and other outgoings of every description to which the demised premises, or the Lessors or Lessee in respect thereof, are now or may during said term be assessed or become liable; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, the Lessee shall be required to pay only such installments as shall become due and payable during the term of this lease together with a like number of installments of interest each in an amount computed by determining the total interest payable during the term hereof with respect to such assessment and dividing said total interest payable by the number of installments of principal to be paid on said assessment by the Lessee hereunder;

69. The Tract A improvement district assessed each individual lot to pay for a pro rata portion of the offsite improvements for the entire subdivision. Under the Tract A leases, the lessee was responsible for the payment of these improvement district assessments, although the lessor

did reduce the amount of annual rent covering the payment period of the improvement district assessment by the amount of annual installments payable on the assessment.

70. Prudential Insurance Company collected the taxes, insurance and other charges due on the property on a monthly basis and the monthly bill dated November 27, 1951 for the Camp property shows lease rent of \$9.67 per month and an improvement district assessment of \$12.00 per month.

71. On December 24, 1975, Bishop Estate sent separate rent renegotiation offer letters to 42 lessees in Tract A which stated that each had until January 15, 1976, within which to respond to the offer. However, the Trustees filed the Complaint on December 29, 1975, naming as Defendants the 40 Tract A lessees and vendees under Agreements of Sale who had not accepted the rental terms offered in the letters.

72. In the letters, the Trustees offered to fix the rent for the remaining 30 years of the lease at an amount equal to  $4\frac{1}{2}\%$  of the present value of the "Trustees' interest." The Trustees' interest is the unencumbered fee value of the lot less the \$850 lot development cost paid by the original lessees. The average annual rent offered to lessees for the remaining 30 years was \$2,943, which is in the top 4% of all lease rents on the island of Oahu.

73. The median age of the defendant Tract A lessees based on a survey with a response rate of over 50% is 62 years of age.

74. The rent offered by Bishop Estate to Mr. and Mrs. Camp would increase their annual lease rent from \$260 to \$2,709 for their two-bedroom, one bath home. Mr. Camp testified that he thought a renegotiated lease rent of about \$1,000 per year would give Bishop Estate a fair return on its original investment in the land.

75. The rent offered by Bishop Estate to Yuji and Naka Miyamoto would increase their annual lease rent from \$260 to \$2,551 for the remaining 30 years of their lease. Mr. and Mrs. Miyamoto are both 77 years old. Mr. Miyamoto testified that he could not afford the high lease rent offered by Bishop Estate on his retirement pay and Social Security. He would be willing to pay an annual rent equal to four times his previous rent of \$260 per year. Mr. Miyamoto has planned to make the house his permanent home. He and his wife have planted a number of trees and flowers which they enjoy tending. They don't want to move.

76. The rent offered by Bishop Estate to Carl and Emma Miller would increase their lease rent from \$260 to \$2,525 a year for the remaining 30 years of their lease. Mrs. Miller is 81 years old. Her husband, who is 82 years old, is blind in one eye and does not have much sight in his other eye. Mrs. Miller testified that she and her husband cannot afford the lease rent offered by Bishop Estate on their limited retirement income and Social Security. They still care for their yard by themselves and have planned to live in their Tract A home permanently. She thinks a lease rent of \$600 to \$800 per year for their two bedroom, one bath house with a carport would be fair.

77. The rent offered by Bishop Estate to Sakae Komenaka, a widow, would increase her annual lease rent from \$260 to \$2,667. Mrs. Komenaka is retired because of a heart condition for which she has a pacemaker. She rents the main portion of her home, consisting of a two bedroom, one bath house for \$350 per month and lives in an expanded recreation room in back of the carport. She rents the house because she needs the income to make ends meet. If she had to pay the rent offered by Bishop Estate, most of the rent she receives for her house would be spent on lease rent. She testified that a lease rent of \$50 per month would



be a reasonable return to Bishop Estate and an amount which she could afford to pay out of her retirement income and Social Security payments. She bought her home with the intention of living there the rest of her life.

78. The lease rent offered by Bishop Estate to Philip and Jane Bankhardt would increase their annual lease rent from \$290 to \$3,207. Mr. Bankhardt is 66 years old and his wife is 60. He retired from the Honolulu Chamber of Commerce in 1975 and his wife does not work. Although he does not want to move, the lease rent of \$265 per month offered by Bishop Estate amounts to an eviction. He has improved the property by planting flowers and fruit trees. He feels that lease rent of \$800 per year for their three bedroom, two bath home would give Bishop Estate a good return.

79. The mean family income in the Waialae-Kahala census area which includes Waialae-Iki, Black Point, Diamond Head and the Beach front section of Kahala is \$25,590 per year and the median family income is \$26,583.

80. The average lease rent of \$2,943 per year offered by Bishop Estate to the Tract A lessees would be a hardship for two-thirds of the families in the Waialae-Kahala census area. The defendants-lessees in Tract A generally have less income than the median and mean family incomes for the Waialae-Kahala census area.

81. Older people tend to live in the same home longer than younger people. Approximately 24% of the older people in Hawaii in 1973 had been living in their present home for 25 years or more and almost 60% of older people had lived in their present home for at least 10 years.

82. Older people become strongly attached to their home if they have lived there a long time and the home plays a larger role in older people's sense of psychological, economic and social independence.

83. Moving is a difficult and stressful event for older people especially if they have lived in their home for a considerable period of time or if they have health problems.

84. Where the lessees have lived in an existing subdivision for a long period of time, the rents demanded on renegotiation may not be related to the lessees' ability to pay.

85. As people get older, their incomes decline. Income is the most important problem for older people in Hawaii. On Oahu, 58% of people over 60 have an income of less than \$4,000 and 27% have an income of between \$4,000 and \$7,000. The income of people over 65 is approximately 44% to 66% of the income of people in the 60-64 age group.

86. A tenfold increase in lease rent from approximately \$250 per year to \$2,500 per year would cause a dilemma for most older people who may be on fixed incomes and who do not have the economic assets to pay such an increase. The economic impact of such an increase would be substantial and would either require the lessee to reduce expenditures for food, recreation and clothing or would require him to move.

87. The lease rents offered by Bishop Estate to the Tract A lessees would cause considerable hardship for a substantial number of them.

88. The Trustees adopted a general leasing policy applying to all Bishop Estate lease negotiations, effective February, 1972, which stated that in the establishment of leasing policies, the financial capability of the prospective lessee was one of the primary factors to be considered. The lease rents demanded by Bishop Estate from the Tract A lessees are beyond the financial capabilities of a substantial number of the Tract A Lessees. ✓

#### IV. HOUSING AND LAND OWNERSHIP

89. Residential properties on the neighbor islands of Kauai, Maui and Hawaii, even though available, are not viable substitutes for residential properties on Oahu because of the distance, travel time and travel expenses between Oahu and these neighbor islands. An abundance of residential land on the neighbor islands will not help to alleviate the single-family residential shortage in Honolulu.

90. The fee simple ownership of land on the island of Oahu is concentrated in the hands of a relatively small number of landowners.

91. The United States, the State of Hawaii, and the City and County of Honolulu combined own 31.5% of Oahu's land, or 117,956 acres.

92. There are 12 major private landowners on Oahu, each owning more than 1% of the land on Oahu (hereinafter referred to as "major landowners").

93. Together, governmental and major landowners control 85% of the total land area of Oahu.

94. The major landowners own 53.5% of the land on Oahu, or 199,808 acres.

95. The major landowners own approximately 78.1% of all the privately held land on Oahu.

96. The three major landowners with the largest shares of land on Oahu own 58.4% of all the privately held land on Oahu, or 39.9% of the total land area of Oahu.

97. The Bishop Estate, with 22.1% of the privately owned land on the island of Oahu, or 15.1% of the total land area, has the largest private landholdings on Oahu.

98. Since the late 1940's, the major landowners, with the exception of Castle & Cooke, have made their land

available for single-family housing in leasehold rather than in fee simple. The large landowners which chose to create residential leaseholds tailored their leases to fit the Federal Housing Administration (hereinafter referred to as "FHA") requirement that leases have a total remaining term of 50 years. By contrast, small landowners on Oahu have sold their land in fee simple for residential development.

99. Use of long-term residential leaseholds became widespread on Oahu because of the parallel practices adopted by the major landowners.

100. During the period from 1951 to 1976, the economy, population and civilian employment in the State of Hawaii increased dramatically. This growth was largely confined to the island of Oahu while the growth patterns of the neighbor islands were relatively flat.

101. Since 1950, the supply of single-family residential housing in fee simple has fallen far short of the demand especially in the areas adjacent to Honolulu.

102. As the suburbs developed around the urban core of Honolulu where the land is largely owned in fee simple, the expansion of small fee owners was limited by large tracts of land around Honolulu owned by the major landowners in the following areas (1) east from Kaimuki to Koko Head, (2) west toward Pearl Harbor, and (3) north to Kaneohe and Kailua.

103. The major landowners which owned the large tracts of land surrounding Honolulu controlled the availability of land and generally chose to follow the parallel practices of making their land available for single-family housing in leasehold rather than in fee simple.

104. From 1961 to 1974, the percentage of total single-family residential houses on leased land on Oahu increased from approximately 16% to approximately 34%, while the

percentage of total single-family residential houses on fee land declined from approximately 84% in 1961 to approximately 66% in 1974. These figures indicate that from 1961 to 1974 an increasingly greater proportion of Oahu's single-family housing demands were supplied on leasehold land.

105. The following areas of Oahu are ranked below in the general order of their desirability for single-family residential purposes:

- (1) Kaimuki to Koko Head
- (2) Windward
- (3) Central Leeward
- (4) Rural

106. In the Kaimuki to Koko Head area where Tract A is located, approximately 5,854 single-family housing units were developed on tracts including 25 or more units from 1961 to 1974, and approximately 93% or 5,434 of those units were developed on leasehold land while approximately 7% or 420 were developed on fee land.

107. In the Waialae-Kahala-Koko Head area, the Bishop Estate owns about 824 of the approximately 975 acres of vacant land zoned for single-family residential use.

108. From 1961 to 1974, 6,041 single-family housing units were developed in Windward Oahu on tracts including 25 or more units and approximately two-thirds of those were on leasehold property while only one-third were developed on fee property.

109. In the windward Oahu area of Kaneohe and Kailua, four major landowners and the federal and state governments hold a substantial portion of the 1,334 acres of vacant single-family residential land in that area. The Bishop Estate owns 350 acres plus a portion of an addi-

tional 647 acres of the vacant land zoned for single-family residential use in the Kaneohe and Kailua area.

110. From 1961 to 1974, there were in excess of 14,000 single-family housing units developed on tracts including 25 or more units in Central Leeward Oahu, which is the area from Pearl Harbor to Ewa and Mililani, and approximately one-third of those units were developed on leasehold land while two-thirds were developed on land sold in fee. The relatively large proportion of single-family housing units developed in fee in the Central Leeward area reflect the decision of Castle & Cooke to sell its Central Leeward property in fee simple instead of following the leasehold practices of the other major landowners.

111. In the area from Pearl Harbor to Mililani, six major landowners and the federal government hold a substantial portion of the 583 acres of the land zoned for single-family residential use that is vacant in that area.

112. In suburban Honolulu, which includes the Kaimuki to Koko Head area, the Central Leeward area and the Kailua-Kaneohe area, Bishop Estate owns approximately 40% of the vacant land zoned for single-family residential use and part of another 22% of such acreage.

113. Forty-six percent of the vacant land on Oahu zoned for single-family residential use is located in rural Oahu where the demand for such land is relatively weak or nonexistent. The reason single-family buyers are not willing to buy land in outlying areas such as Waianae and Kaena Point involves complex sociological problems, but the net result is that people have chosen to live in suburbs which are adjacent to the urban core of Honolulu.

114. At the present time, there is a shortage of single-family housing on Oahu and an even greater shortage of fee simple single-family housing in the suburban areas where such housing is demanded.



115. The housing vacancy rate from 1950 to 1973 has generally been less than 3%. This figure includes vacancies throughout Hawaii and on Oahu for both houses and apartments. Such a vacancy rate indicates a tight market. A vacancy rate in excess of 10% would be indicative of a highly competitive market.

116. The difference between the value of fee simple properties and leasehold properties has been reduced as a result of the housing shortage on Oahu to the point that there is only a 10% difference in the price between fee simple properties and comparable leasehold properties.

117. Overly restrictive residential zoning has not caused the shortage of single-family housing on Oahu. The existence of vacant land in rural and urban areas, already zoned for residential use, will not alleviate the shortage, because the development practices of the major landowners control the availability of land for housing.

118. Statistics regarding the concentration of land owned by major landowners and the size and location of the tracts owned by major landowners indicate that the single-family housing market in the urban corridor can be described as "quasi-monopolistic."

119. Statistics regarding the concentration of ownership of land adjacent to the central core of Honolulu and the parallel practice of major landowners, with the exception of Castle & Cooke, to develop properties in leasehold and the dominance of leasehold development over fee simple development in these areas indicate that the single-family residential housing market in that area is oligopolistic.

120. There has been an oversupply of condominiums on Oahu since 1975 and the oversupply is expected to last into the immediate future.

## V. MORTGAGE FINANCING REQUIREMENTS

121. Since the late 1940's, long-term residential leasehold provisions have been tailored to satisfy FHA requirements.

122. Initially, the FHA required that the term of residential leases be more than 50 years and that the lease rent be specified for a period at least five years beyond the amortization of the loan.

123. Currently, the FHA will not insure a single-family residential leasehold mortgage unless 50 years are remaining under the lease and the amortization term is equal to or less than the remaining fixed rent period of the lease.

124. Presently, the Veterans Administration loan guaranty program has the same requirements as the FHA Mortgage Insurance Program except that the Veterans Administration will permit the amortization period to extend within 14 years of final termination of the lease.

125. The Federal National Mortgage Association will not buy mortgage loans unless the full term of a residential lease extends at least ten years beyond the amortization period and that amortization period cannot extend more than five years beyond the fixed rent period.

126. For uninsured conventional loans for single-family leasehold residences, Bank of Hawaii requires that the total term of the lease extend at least ten years beyond the amortization period of the loan and that the lease rent be fixed for at least ten years.

127. Savings and loan associations in Honolulu generally require a residential lease to extend ten years beyond the amortization period of the loan and have at least ten years of fixed rent remaining under the lease. Territorial Savings and Loan Association restricts the amortization period of its residential leasehold mortgage loans to double the fixed rent period. First Federal Savings and Loan Association restricts the amortization terms

of residential leasehold loans to ten years more than the fixed rent period under the lease.

128. The frequency with which lease rent renegotiations occur because of lessee financing requirements is estimated to be a minimum of one to two times during the first 30 years of a lease and at least three times during the 55 year lease term.

129. Lenders in Honolulu generally require that a residential loan applicant's housing costs, consisting of principal, interest, taxes, insurance and lease rent, not exceed 25% of his monthly income. As a result, any increase in a residential loan applicant's lease rent will decrease the amount of money available for the applicant's other housing-related expenses such as principal, interest, taxes, and insurance. For instance, where an applicant's lease rent is \$20 per month, he needs \$80 per month of income to qualify for a loan to cover the lease rent portion of his housing costs. If his lease rent is increased to \$200 per month, he must have \$800 per month of income to qualify for a loan to cover the lease rent portion of his housing costs and must earn \$720 more per month to qualify for a loan in the same amount. If a lessee's lease rent is increased by a substantial amount, he might be unable to qualify for mortgage.

130. A mortgage institution is disturbed if the initial ratio between a borrower's (1) principal and interest payments and other home expenses and (2) income is affected because of a substantial increase in lease rent.

131. The lessor's right to receive rent payments under the lease has priority over the mortgage lender's right to receive mortgage payments.

132. If a lessee fails to make his mortgage payments and his lease payments, the mortgage lender would be required to make the lease payments on behalf of the

lessee in order to preserve its mortgage on the leasehold estate. The position of the lessor is more secure than the position of the mortgage lender.

## VI. HAWAII'S ECONOMY

133. The demand for real estate is basically a demand for space. The demand for urban real estate is influenced by many factors—the demand for residential housing is related to increases in population, the level of income, the liberality of mortgage terms, the level of employment, income distribution and family total income, proportion of housing rented or owned, demographic data including ages of population and general distribution of population among age groups, family size, and other factors.

134. Total personal income in Hawaii for the period 1951 through 1976 increased from a total well under a billion dollars to something in excess of six billion dollars. Except for the period 1951 through 1956, Hawaii's rate of growth exceeded that of the nation as a whole.

135. Total real personal income in Hawaii for the period 1951 through 1976 measured in 1967 dollars increased at a lesser rate than total personal income measured in current dollars. The trend line shows three distinct periods in the rate of growth; namely, 1951 to 1958, 1958 to 1973, and 1973 to the present. For the first period 1951 to 1958, the trend line is flat; for the second period 1958 to 1973, the line is relatively steep in the upward direction; and then for the period 1973 to 1976, the line is again flat.

136. Civilian employment in Hawaii during the period 1951 through 1976 experienced a rate of growth similar to that experienced in the Total Real Personal Income category and the pattern of growth shown by a trend line is also similar. The growth, however, occurred mainly on the Island of Oahu. The neighbor island counties experi-

enced a decline during the period 1951 through 1961 and then a slight increase since 1961.

137. Total resident population in Hawaii during the period 1951 through 1976 experienced a rate of growth similar to that experienced in civilian employment and the personal income categories, except that there is no slackening of the trend line between 1972 and 1976.

138. Economic activity as measured by private bank deposits, value of construction, retail sales, during the period 1951 through 1976, increased in dramatic proportions in current dollars.

139. Price inflation as measured by the Honolulu Consumer Price Index for the period 1951 through 1976 was in the magnitude of 129.3 percent. During the period 1951 to 1956, inflation set in at the rate of 1 percent; from 1956 to 1961, a more rapid increase in prices occurred; from 1961 to 1966, at approximately the same rate of increase as in the previous 5 years; from 1966 to 1971, a considerable jump in the rate of increase of about 22 percent; and then from 1971 to 1976, the most dramatic increase of about 37 percent were experienced.

140. Federal government civilian employment, construction employment, diversified manufacturing employment, transportation communications and utilities employment, hotel employment, other services employment, finance, insurance, and real estate employment, wholesale and retail trade employment, State and County government employment, for the years 1951 through 1976, all show substantial increases although in varying degrees.

141. In the seven years between 1968 and 1975, 65 percent of all the hotel rooms totalling some 43,000 units today was built; about 50 percent of all the office space was built; and practically every high rise building in Makiki and Waikiki was built. The construction industry

employed 8 percent of the total labor force at a time when the national average was 4 percent. The value of construction put in place during the period was about 20 percent of total personal income, when the national average was about 10 percent.

142. The future of sugar is bleak. Even with price supports at the announced goal of  $13\frac{1}{2}$  cents or \$270 per ton, the average cost of production of \$263 per ton leaves very little to cover the marginal operations which are below the average. About one-third to one-half of the sugar industry is likely to be lost over a period of time. The impact would be felt mainly on the neighbor islands, although Oahu will not be immune from such effects.

143. The pineapple industry is stabilized. There is no reasonable prospect of growth. During the last 15 years, the pineapple industry shrank from 9 companies to 3 companies and from 75,000 acres in cultivation to 40,000 acres.

144. The military is not expected to be a growth industry for Hawaii. Increases in expenditures in recent years has not exceeded the rate of inflation. The nature of military expenditures is such that it is not susceptible to prediction with reasonable accuracy.

145. Tourism will continue to grow not at the rate experienced percentage-wise over the last 20 years but in absolute terms. Such growth in tourism would not produce the growth in the total economy as experienced in the last 20 years but only half the rate. Moreover, most of the growth will be on the neighbor islands. In 1960, of the total number of hotel rooms in the State, 85 percent were located on Oahu and 15 percent on the neighbor islands. The ratio is likely to change further with the neighbor islands increasing their share.



## VII. THE OWNER'S BASIS DEFINITION IN ACT 185

146. Act 185 limits the maximum annual rent which a lessor may charge a lessee upon renegotiation of the lease rent terms of a residential lease contract to 4% of owner's basis.

147. Act 185 provides that lease rent renegotiations under Act 185 "shall not be scheduled more frequently than once every 15 years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease."

148. The provision of Act 185 quoted in paragraph 147 above does not affect or conflict with the provisions of the Tract A leases which specify the rent for the first 25 years of the lease and provide for negotiation of the rental terms for the remaining 30 years of the lease and, therefore, is not at issue in this case.

149. The owner's basis definition in Act 185 apportions the current fair market value of the unencumbered fee lot, excluding onsite improvements, between the lessor and the lessee.

150. Owner's basis is defined in Act 185 as follows:

[C]urrent fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements, attributable to the land, which replacement cost shall include an overhead and profit not exceeding 20% of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. (Section 519-2(a)(2) H.R.S., as amended)

151. Act 185 defines offsite improvements as follows:

[A]ll physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and

underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; . . . (Act 185, § 2)

152. Act 185 defines onsite improvements as follows:

[A]ll physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools. (Act 185, § 2)

153. The owner's basis definition is not particularly difficult to apply and could be applied by appraisers in practice.

154. The owner's basis definition in Act 185 provides a practical, reasonable method for allocating the current value of the improved leasehold lot between the lessor and lessee for the purpose of rent renegotiation.

## VIII. RENTS AND RATE OF RETURN UNDER ACT 185

155. The rate of return to Bishop Estate on the Tract A leases should be measured by the composite yield which includes both current lease rent and appreciation in the value of the underlying leased fee interest owned by Bishop Estate.

156. A lot improvement cost in the amount of \$850 was charged to each of the original lessees in Tract A by Bishop Estate.

157. The offsite improvements for Tract A were paid for through an improvement district. A cost of 21.160507

cents per square foot was assessed against each Tract A lot and the costs assessed against each lot have been paid off over time by the lessees pursuant to the terms of their leases.

158. The improvement district cost of \$1,951.48 assessed against the Camp lot, which contains 9,222 square feet, was billed to Mr. and Mrs. Camp. A lot development charge of \$850 was also paid by Mr. and Mrs. Camp. Bishop Estate's initial investment in the Camp lot was \$4,150. The rent under the Camp lease was set at \$116 for the first 18 years and at \$260 for the next 7 years.

159. Appraisers in the City and County of Honolulu generally estimate that residential land in developed neighborhoods will appreciate at an average rate of approximately 5% per year. An annual rate of appreciation of 5% is considerably lower than the appreciation which has occurred in Tract A in the past 15 years. A rate of appreciation of 5% a year is a reasonable estimate of appreciation in residential land in the future.

160. The annual rent allowed under the provisions of Act 185 for the Camp lease would be approximately \$1,903, which would provide Bishop Estate with a current annual rate of return on its initial investment of approximately 45.9% over the remaining 30 years of the lease without recognizing appreciation or an average composite yield of approximately 9.5% over the full 55 year term of the lease with appreciation taken into account.

161. The average size of the lots leased by the Tract A defendants-lessees is 9,587 square feet and the average improvement district cost per lot was about \$2,028.66. The lot improvement cost paid for each Tract A lot was \$850 per lot. The average annual rent for the Tract A defendants-lessees for the first 18 years was \$120 and for the next 7 years it was \$269. Bishop Estate's average initial investment in these Tract A lots was \$4,314.

162. The annual rent allowed under the provisions of Act 185 for the average lot in Tract A would be approximately \$1,940, which would provide Bishop Estate with a current annual rate of return on its initial investment of approximately 45.0% over the remaining 30 years of the lease without recognizing appreciation or an average composite yield of approximately 9.5% over the full 55 year term of the lease with appreciation taken into account.

163. The Bishop Estate staff estimates that on the average its residential lessees will renew or extend their leases after only 15 years of the initial fixed rent period of their leases have elapsed. Bishop Estate's estimate with respect to the frequency of such renewals or extensions is supported by the testimony of Wesley Hillendahl, an economist with the Bank of Hawaii, who stated that the typical property in Hawaii turns over about every 8 years. Stanley Baird, a Vice President of Bank of Hawaii and manager of Bank of Hawaii's Residential Mortgage Loan Administration also testified that the average life of a residential loan in Hawaii is less than 10 years.

164. Renewals and extensions of leases result in the early renegotiation of lease rent. Bishop Estate expects much higher rents from its residential leases which have been renewed or extended than from the original rents provided for in the leases.

165. Bishop Estate did not prove what costs and expenses, if any, were attributable to management and administration of its residential leaseholds.

#### IX. EVALUATION OF THE RATE OF RETURN ALLOWED UNDER ACT 185

A. *Compared with the formulas recommended by ERA.*

166. In its 1969 study of Bishop Estate's residential leasehold policies, ERA recommended two formulas for computing the amount of annual rent to charge Bishop Estate lessees. The annual rent on the Camp lot of approximately \$1,831 under both ERA formulas is less than the annual rent of approximately \$1,903 allowed under Act 185.

*B. Compared with Consumer Price Index.*

167. Between 1951 and 1975, the Honolulu Consumer Price Index which reflects the increase in costs and expenses of a blue collar metropolitan family of four has risen by a factor of approximately 2.34, and using this factor on the present annual rent of \$260 charged on the Camp lease and the present average rent for the 40 leases, both rentals would be increased to \$608 and \$630, respectively.

*C. Compared with median income of families.*

168. Median family income has increased by a factor of slightly over 4 between 1950 and 1974. It is an indicator of a family's general ability to pay for various goods and services including housing. If the lease rent for a lot in Tract A was \$250 in 1950, the lease rent for the same lot in 1974, increased in accordance with median family income, would be approximately \$1,038.

*D. Compared with per capita personal income.*

169. Per capita personal income measures the purchasing power of an individual person and has increased at about the same rate as median family income. Per capita personal income is one of the ways to measure an individual's general ability to pay for various goods and services including housing. Based on the increase in per capita personal income, lease rent of \$250 in 1950 should be increased to approximately \$1,030 in 1974.

170. Per capita disposable personal income, which is per capita personal income less taxes, is a better measure of a person's purchasing power than per capita personal income. Per capita disposable income has risen somewhat less than per capita personal income between 1951 and 1975 because during that period taxes have increased. Average taxes have risen from about 25% in the 1950's to about 33% now, so the lease rent based on the increase in per capita disposable personal income would be somewhat less than the annual lease rent based on per capita personal income.

*E. Compared with increase in the shelter rent index.*

171. The shelter rent index is a measure of the median rents for a particular period of time and is based on the actual rents people are paying for housing. It is a composite figure, including single-family and multiple-unit housing. Between 1951 and 1975, the shelter rent index has increased by a factor of approximately 5.06. If the increase in the shelter rent index were used to increase the average rent for Tract A and the Camp lease rent, the rents would be approximately \$1,361 and \$1,316, respectively.

*F. Compared with rents in Waialae—Iki IV.*

172. Homes in the leasehold development known as the Waialae-Iki View Lots—Unit IV (hereinafter referred to as "Unit IV"), which are located on Bishop Estate land, were sold during 1975. Unit IV, which is located near Tract A, is a more desirable location than Tract A because it has better homes, a better view and is a higher quality development than Tract A. Purchasers of homes in Unit IV have also invested more money in their homes.

173. The difference in value of homes in Tract A and Unit IV is indicated by a comparison of the median and average sales prices of recent sales in those developments. The median price of a home purchased in Tract A between 1976 and 1977 was \$81,500, while the corresponding figure for Unit IV was \$163,000. The average price of a home in Tract A between 1976 and 1977 was \$83,560 compared to the average of \$149,440 of a Unit IV home.

174. The average lease rent in Unit IV is \$1,320 for the first 30 years of the lease based on rent of \$1,100 a year for the first 15 years and \$1,650 per year for the next 15 years. The Unit IV rents are the highest lease rents charged by Bishop Estate for any of its new subdivisions. Only beachfront lot rents are higher.



175. The rent demanded by Bishop Estate for its Unit IV lots is presumably in balance with the income of Unit IV's homeowners because the residents of Unit IV would not have been able to obtain financing if the lease rent demanded from them was not proportionate to their total income.

176. The residents of Tract A have been asked by the Trustees to pay more than twice as much rent for Tract A lots which are worth considerably less than the Unit IV lots.

*G. Compared with Lessees' testimony regarding their ability to pay.*

177. The mean lease rent for Tract A of approximately \$2,943 annually offered by Bishop Estate would be a hardship for at least two-thirds of the homeowners in the Waialae-Kahala area and would be a hardship for an even greater proportion of the Tract A defendants.

*H. Compared with the rate of return on bonds.*

178. As of July 22, 1977, the yield on several different types of bonds was as follows:

	<u>Yield (%)</u>
U.S. Government Bonds (Maturity 1986) . . . .	7.22
U.S. Government Bonds (Maturity 2000) . . . .	7.60
Industrial Bonds (30 year AAA) . . . . .	7.95
Corporate Bonds (10 year AAA) . . . . .	7.30
Utility Bonds (30 year AAA) . . . . .	8.10

179. There is really no investment in bonds which is as good as Bishop Estate's investment in residential leasehold because bonds do not have the built-in hedge against inflation that Bishop Estate's residential leasehold investment provides.

180. Bishop Estate should be willing to accept a lower yield on its real estate investment than it might expect if it were to invest in bonds.

*I. Land is secure and stable investment.*

181. No investment has provided a more stable and secure investment and more appreciation over the last 15 years than an investment in land.

182. The increase in the value of the land has more than compensated for any inflationary impact on lease rents.

183. Residential leasehold land provides a more than adequate hedge against inflation. If inflation increased at a rate greater than the 5% straight-line appreciation per year forecast by witnesses in the trial, Bishop Estate would be compensated for any increased inflation by an increase in the appreciation of its land.

184. Bishop Estate's residential leasehold land is a highly marketable and liquid asset.

*J. A fair rate of return.*

185. Act 185 allows Bishop Estate a fair, just and reasonable return on its Tract A residential leasehold. A rate of return somewhat lower than the 4% of owner's basis provided for in Act 185 would still provide Bishop Estate with a fair and reasonable return on its residential leasehold land.

186. Generally, a composite yield of between 6% and 7% would provide Bishop Estate with a fair, just and reasonable return on its investment in residential leasehold.

**X. ARBITRATION PROVISIONS OF ACT 185**

187. The arbitration provision in Act 185 provides as follows:

In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii Housing Authority or its designee shall arbitrate, and its findings shall be binding and conclusive on both parties. (Section 519-2(b) H.R.S., as amended)

188. Act 185 limits the use of arbitration to lease rent renegotiation.

189. Act 185 requires that the Hawaii Housing Authority or its designee, rather than a three-member arbitration panel, arbitrate any lease rent renegotiation disputes between Bishop Estate and the Tract A lessees.

190. One of the concerns of the Hawaii Legislature in promulgating Act 185 was to provide an expeditious method of resolving disputes regarding residential lease rent renegotiation. Standing Committee Report No. 752 of the Senate Committee on Housing and Hawaiian Homes of the 1975 Legislative Session stated in relevant part:

In the event that the lessor and lessee are unable to reach agreement during renegotiation, the Hawaii housing authority or its designee is directed to arbitrate. Your Committee has determined that, in order to further redress the unconscionable imbalance in bargaining between lessors and lessees on residential leaseholds and to effectuate the foregoing, it is necessary to provide for an expeditious manner of settling disputes during renegotiation.

191. No procedures for implementation of the provision have been established by the Hawaii Housing Authority.

192. Neither the Bishop Estate nor the Tract A lessees have requested that the Hawaii Housing Authority arbitrate their lease rental disputes.

193. The Hawaii Housing Authority is a properly formed state agency and the plaintiffs have not proven that the Hawaii Housing Authority cannot properly and fairly discharge its duties under Act 185.

194. The remainder of Act 185 could be applied and implemented even if the arbitration provision contained in Section 2(b) were deleted from the Act.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this case and the parties.

2. An actual controversy exists between the parties regarding the interpretation and constitutionality of Act 185, 1975 Session Laws of Hawaii, codified in Section 519-2, Hawaii Revised Statutes, as amended. Section 2 of Act 185 provides as follows:

(a) [A]ll leases, as defined by Section 516-1(5), of residential lots, as defined by Section 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after June 2, 1975, provide the following, or in the case of leases existing on June 2, 1975, shall be construed in conformity with the following:

(1) Such renegotiation shall not be scheduled more frequently than once every fifteen years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease; and

(2) Upon renegotiation, the lease rent payable shall not exceed the amount derived by multiplying the "owner's basis" by 4%. For purposes of this section, "owner's basis" means the current fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered; less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the land, which replacement cost shall include an overhead and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. For purposes of this section, "offsite improvements"

means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; and "onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(b) In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii housing authority or its designee shall arbitrate, and its findings shall be binding and conclusive on both parties.

(c) Any covenant or provision of a lease in violation of this section, shall not be enforceable in any court in this State.

(d) For the purpose of this section renegotiation shall not include negotiation for the determination of lease rental under section 516-66 arising out of an extension under section 516-65.

Section 3 of Act 185 contains a standard severability provision which provides as follows:

If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the validity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

3. The plaintiffs as Trustees of the single largest lessor of residential property in the State of Hawaii and the defendants-lessees have a concrete interest in the interpretation and constitutionality of Act 185 because the initial 25 year fixed rent period under the leases between the Trustees and the defendants-lessees expired on December 31, 1975, and the annual lease rent for the final 30 years of the lease terms commencing on January 1, 1976, has not yet been renegotiated and the renegotiation of the annual rent under these leases is covered by the provisions of Act 185.

4. The Hawaii Housing Authority, its Director, its Commissioners and the Director of the Department of Social Services and Housing also have a concrete interest in the constitutionality of Act 185 because the Hawaii Housing Authority is named as arbitrator under that Act.

5. The Attorney General of the State of Hawaii has a concrete interest in the constitutionality of Act 185 because he represents the interests of the public in matters concerning administration of trusts established for charitable and educational purposes including the Bishop Estate.

6. A declaratory judgment in this action will serve to terminate the controversy among the parties regarding the constitutionality of Act 185 and the Court's instructions to the Trustees will serve to avoid further controversy between the Trustees or other similar residential lessors and their lessees regarding the renegotiation of rent under residential leases covered by Act 185. Therefore, the Court has jurisdiction to render a declaratory judgment pursuant to Section 632-1, Hawaii Revised Statutes, and Rule 57, Hawaii Rules of Civil Procedure. *See Dalton v. City and County of Honolulu*, 51 Haw. 400 (1969).

7. Section 2(a)(1) of Act 185 provides that lease rent renegotiations under reopening provisions in leases covered by Act 185 shall not be scheduled more frequently than



once every fifteen years. The Trustees allege that this provision requires that the rent be fixed for an unreasonably long period of time and makes this provision of Act 185 unconstitutional. The Tract A form of lease at issue in this case fixes the rent for an initial period of 25 years and then for the remaining 30 years at an amount to be renegotiated between the parties. Since the rent is fixed on renegotiation for the remaining 30 years of the lease, the fifteen-year limitation provision in Act 185 has no effect on this lease and the Trustees cannot challenge it here.

[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other situations in which its application might be unconstitutional. *United States v. Rains*, 362 U.S. 17, 21, 4 L.Ed. 2d 524, 80 S. Ct. 519 (1960).

Therefore, the Court declines to rule on the constitutionality of that provision. However, the evidence presented in this case indicates that the renegotiation of rent under long-term residential leases presents potential problems and expenses for both the lessor and the lessee and that financial institutions in Hawaii often require fixed rent periods of at least 10 years as a condition for mortgage financing. Consequently, it appears that fixed rent periods shorter than 15 years may impose an unreasonable hardship on the residential lessee and severely restrict his ability to resell his property to buyers requiring mortgage financing.

8. Section 2(b) of Act 185 provides that in the event the parties fail to agree on the amount of rent under a reopening provision, the Hawaii Housing Authority or its designee shall act as arbitrator and that its findings shall be "binding and conclusive" on both parties.

9. The Trustees allege that this arbitration provision is "compulsory" and unconstitutional because it deprives

them of their right to jury trial and violates their right to procedural due process because it requires all disputes under the lease to be resolved by arbitration without any appeal to the judicial system. The lease already contains an arbitration clause which requires arbitration in the event that the parties fail to agree on the annual rental on reopening and provides that the decision of the arbitrators shall be "final, conclusive and binding upon both parties" unless vacated, modified or corrected as provided in Chapter 165, Revised Laws of Hawaii 1945. Chapter 165, Revised Laws of Hawaii 1945 is now Chapter 658, Hawaii Revised Statutes, as amended. Chapter 658 provides that arbitration awards may be vacated, modified or corrected by the Court under certain circumstances.

10. It is axiomatic that this Court must interpret the arbitration provision of Act 185, if at all possible, to make it constitutional. *Pan American Airways Co. v. Godbold*, 36 Haw. 170, 182 (1942). Accordingly, the Court construes the arbitration provision in Act 185 as being limited in its application to the renegotiation of rent on reopening in the event the parties fail to agree on the annual rental which is already covered by the compulsory arbitration clause in the lease. Under this construction, the arbitration function to be performed by the Hawaii Housing Authority under Act 185 is identical to the function to be performed by the arbitration panel provided for in the lease.

11. The provisions of Chapter 658, Hawaii Revised Statutes, apply to the Tract A leases as though incorporated therein. Act 185 contains no provision limiting the right of the parties to appeal the arbitration decision as provided for in the lease. Therefore, the decision of the Hawaii Housing Authority as arbitrator under Act 185 is subject to the same right of appeal as provided for in the lease and may be vacated, modified or corrected as provided for in Chapter 658. The only change made by Act 185 in the lease arbitration clause is the substitution of the

Hawaii Housing Authority for the panel of three real estate appraisers.

12. In the alternative, if the Supreme Court of Hawaii holds that Chapter 658 of the Hawaii Revised Statutes is inapplicable, the Court finds that a decision of the Hawaii Housing Authority as arbitrator under Act 185 is subject to judicial review as provided for in the Hawaii Administrative Procedure Act, Chapter 91, Hawaii Revised Statutes. *Aguilar v. HHA*, 53 Haw. 478 (1974).

13. The arbitration provision of Act 185 does not deny the Trustees their right to procedural due process and does not deny them their right to judicial review or jury trial.

14. The Trustees allege that Act 185 is an unconstitutional impairment of the Trustees' lease contract in violation of Article 1, Section 10 of the United States Constitution. The Trustees have exaggerated the potential effect of Act 185 on their lease. The Tract A lease provides that the rent on renegotiation "shall be mutually agreed upon by the lessors and the lessee" and that in the event they "fail to reach an agreement, then . . . the annual rent shall be the fair and reasonable rental of the land demised (exclusive of buildings) as shall be determined by three arbitrators, who shall be recognized real estate appraisers . . ." The provisions of Act 185 do not contradict the lease with respect to the amount of rent to be set on renegotiation since the lease does not specify how the "fair and reasonable annual rental of the land" is to be computed. Act 185 does provide guidelines and a maximum limit on the annual rental and substitutes the Hawaii Housing Authority as arbitrator in place of the panel of three real estate appraisers as discussed above. As the Trustees concede in their answering brief, it is now well settled that private contracts are subject to legitimate exercise of the police power without any unconstitutional impairment of contract. *Home Building and Loan Association v. Blaisdell*,

290 U.S. 398 (1934); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Stone v. Mississippi*, 101 U.S. 814 (1879).

15. The Trustees also allege that Act 185 takes the Trustees' property without just compensation in violation of Section 1 of the Fourteenth Amendment incorporating the Fifth Amendment to the United States Constitution. Regulatory legislation like Act 185 may severely reduce the value of property or greatly restrict the earnings from property as a valid exercise of the police power without any unconstitutional "taking" of property without compensation. *South Terminal Corp. v. E.P.A.*, 504 F. 2d 646 (1st Cir. 1974); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 60 L. Ed. 348, 354, (1915).

16. The Trustees also allege that Act 185 denies the Trustees substantive due process in violation of Section 1 of the Fourteenth Amendment to the United States Constitution. The standard of judicial review for determining whether Act 185 is a valid legislative exercise of the police power or an unconstitutional impairment of contract or "taking" without just compensation is the same as the standard for determining whether there has been a violation of substantive due process: All three constitutional challenges prohibit only legislation that is arbitrary, capricious and not reasonably related to a proper legislative purpose. See *Nebbia v. New York*, 291 U.S. 502, at 539 (1934); *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1962); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

17. Trustees' argument that Act 185 applies retroactively and denies due process through curtailment of their "vested rights" is without merit. Act 185 is a reasonable exercise of the police power and serves a strong pub-

lic interest and does not curtail Trustees' use or enjoyment of their rights.

18. There is no special requirement of an economic emergency or social emergency in order to justify the rent limitation provision contained in Act 185. *See, e.g., Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 483-487 (1976); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A. 2d 1 (1975); *Eisen v. Eastman*, 421 F. 2d 560 (2nd cir. 1969); *cf. Olsen v. Nebraska*, 313 U.S. 236, 245, 85 L. Ed. 1305, 1309, 61 S. Ct. 862 (1941); and *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934). The State of Hawaii is beset by numerous complex and varied social and economic problems. The legislature is not required by either the United States Constitution or the Hawaii Constitution to abstain from dealing with these problems until they reach crisis proportions. The legislature must be given enough latitude to enact legislation which deals rationally with problems of varying degrees of severity which are of legitimate public concern.

19. Act 185 is presumed to be a valid exercise of the legislative power and the legislative findings contained in Section 1 of Act 185 are presumed to be true. *In re Mott-Smith*, 29 Haw. 346 (1926); *Koike v. Board of Water Supply*, 44 Haw. 100, at 103-104, 352 P. 2d 835, at 838 (1960); *Territory v. Akase*, 43 Haw. 84, at 88 (1958); *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952); *Bishop of Mahiko*, 35 Haw. 608 (1940); *State v. Kahalewai*, 541 P. 2d 1020 (Haw. 1975); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P. 2d 1001, 130 Cal. Rptr. 465 (1976); *Troy Hills Village v. Township Council*, 68 N.J. 604, 350 A. 2d 34 (1975); *Hutton Park Gardens v. Town Council of the Town of West Orange*, 68 N.J. 543, 350 A. 2d 1 (1975); *Israel v. City Rent and Rehabilitation Administration*, 285 F. Supp. 908 (S.D.N.Y. 1968). The burden of proof is on the Trustees in challenging the constitutionality of duly enacted legislation like Act 185 to prove that the legisla-

tion is arbitrary, capricious and not reasonably related to a proper legislative purpose.

20. The Trustees have failed to disprove the material findings in Section 1 of Act 185 which the Legislature has recited to justify the enactment of Act 185. Therefore, the Court concludes from the unrebutted legislative findings and the evidence presented in this case that the purpose of Act 185 as stated by the Legislature in Section 1 is a legitimate legislative purpose and the enactment of legislation for that purpose is in the public interest:

The Legislature declares it to be the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rent set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms [and] . . . to prevent the imposition of confiscatory economic burdens upon the lessees of residential property . . .

21. The Court also concludes from a complete review of the explicit, unrebutted findings contained in Act 185 and from the evidence presented in this case that it was also the purpose of the Legislature in enacting Act 185 to discourage continued expansion of landowner investments in single-family residential leasehold and to encourage the orderly withdrawal of existing landowner investments in single-family residential leasehold. The Court further concludes from the unrebutted legislative findings and the evidence presented in this case that this is also a proper legislative purpose and that the enactment of legislation for that purpose is in the public interest.

22. The Trustees have failed to prove that Act 185 is arbitrary, capricious and not reasonably related to a proper legislative purpose and, based upon the unrebutted legislative findings and the evidence presented in this case, the Court concludes that the procedures, guidelines and



rent limitations provided for in Act 185 are reasonably related to the legislative purposes stated above.

23. Specifically, there are a number of reasonable justifications for substituting the Hawaii Housing Authority for the panel of three real estate appraisers provided for in the lease: equalize the bargaining power between the parties; expeditious resolution of rent renegotiation disputes; reduction in the expense of lease rent arbitration; and greater uniformity of arbitration decisions. The Trustees have not effectively rebutted any of these justifications.

24. The "owner's basis" definition contained in Act 185 provides a practical, reasonable and equitable method for allocating the current fair market value of an improved leasehold lot between the Trustees and their lessees for the purpose of rent renegotiation.

25. The limitation of annual rent to the amount derived by multiplying the "owner's basis" by 4% contained in Act 185 places a reasonable limitation on the rent to be set on renegotiation that will provide Bishop Estate with a just, fair and reasonable return on their leased-fee interest under the facts presented in this case and with due consideration for the legislative objectives of Act 185.

26. The Trustees allege that Act 185 denies their right to equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution. More particularly, they allege that it is an unconstitutional classification for the Legislature to restrict the coverage of Act 185 to long-term leases on single-family residential property instead of including all types of residential leases on all types of properties. In order to demonstrate a violation of the equal protection clause on this ground, the Trustees have the burden of proving that the classification adopted by the Legislature in Act

185 is irrational or unreasonable. *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

27. The equal protection clause does not require that the Legislature must deal with any problems which may exist with regard to other types of leases or other types of properties. "The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 491, 485, 503, 90 S. Ct. 1153, 25 L.Ed.2d 940 (1970). The Trustees have failed to prove that the classification adopted by the Legislature in Act 185 is irrational or unreasonable. Therefore, the Court concludes that the classification adopted by the Legislature in determining the types of leases and the types of properties covered by Act 185 is reasonable and rational.

28. The Trustees have also alleged in their Memorandum in Opposition to Motion for Summary Judgment that Act 185 is discriminatory because its application will be limited to a small group of major landowners who have chosen to make their land available for single-family residential development only under long-term residential leases instead of in fee simple. They rely upon the decision by the United States Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), to support their contention. The Trustees' reliance on that case is misplaced. There the Supreme Court concluded that a statute prohibiting laundries in wooden buildings was really a veiled attempt to discriminate against persons of Chinese ancestry who had to operate their laundries in wooden buildings. Act 185 is not discriminatory on its face and in order to prevail on this allegation, the Trustees have the burden of proving that the purpose behind the legislation was to discriminate against major landowners rather than to provide relief for problems with residential lease rent renegotiation.

29. The Trustees have failed to prove that Act 185 was enacted for the purpose of racial discrimination or for the purpose of discriminating against a small class of major landowners. In fact, the evidence presented in this case proved that the major landowners affected by Act 185 are responsible for development of the residential leasehold system in Hawaii and that the Trustees' past residential leasehold policies have contributed to many of the problems associated with it. Therefore, the Court concludes that Act 185 was enacted by the Legislature for the purposes stated in paragraphs 20 and 21 above and not for the purpose of discriminating against major landowners.

30. Act 185 is not an unconstitutional impairment of the lease contract in violation of Article I, Section 10 of the United States Constitution.

31. Act 185 does not take property without just compensation in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

32. Act 185 does not deny substantive due process in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

33. Act 185 does not deny rights to equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

34. Act 185 is a legitimate exercise of the police power and is constitutional.

35. The determination of the new annual lease rental on renegotiation of such lease under the Tract A leases is to be made in conformity with the applicable provisions of Act 185.

36. The Trustees are to be instructed that it is their responsibility to determine the annual lease rental for the final 30-year period of the term of the Tract A leases under

the terms of the leases and in accordance with the applicable provisions of Act 185.

37. This Court shall enter a declaratory judgment that Act 185, Session Laws of Hawaii 1975, codified in Section 519-2, Hawaii Revised Statutes, as amended, is constitutional and that the rights and obligations of the Trustees and lessees and vendees herein are governed by the provisions of Act 185 and that all the provisions of Act 185 challenged herein are constitutional.

38. This Court holds that Act 185 is applicable to all leases of residential lots, as defined by Act 185, as of June 2, 1975, or entered into thereafter.

39. This Court shall issue instructions herein to the Trustees directing that the determination of the annual lease rent for the final 30-year period of the terms of the leases issued by the Trustees to lessees shall proceed under the terms of the lease and in accordance with the applicable provisions of Act 185.

40. Costs and reasonable attorney's fees are to be taxed.

Dated: Honolulu, Hawaii, June 29, 1978.

H. LUM

Judge of the above entitled Court

**Appendix L**

United States Court of Appeals  
For the Ninth Circuit

No. 80-4368  
D.C. No. 79-0096

Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,

v.

Paul A. Tom, et al.,  
Defendants-Appellees,  
and

Wai-Kahala Tract "H" Association, Inc., et al.,  
Intervenors-Appellees.

**MEMORANDUM OF AMICUS CURIAE  
HERMAN LUM**

**HERMAN LUM**

Chief Justice Designate and  
Acting Administrative Head  
of the Judiciary of the  
State of Hawaii  
P. O. Box 2560  
Honolulu, Hawaii 96804

**(CERTIFICATE OF SERVICE ATTACHED)**

United States Court of Appeals

For the Ninth Circuit

No. 80-4368

D.C. No. 79-0096

Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,  
Matsuo Takabuki and Myron B. Thompson, Trustees of the  
Kamehameha Schools/Bishop Estate,  
Plaintiffs-Appellants,

v.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi,  
Wayne T. Takahashi, Lawrence N.C. Ing,  
Nobuyoshi Tamura, Andrew I.T. Chang,  
and David C. Slipher,  
Commissioners of the Hawaii Housing Authority;  
Franklin Y.K. Sunn, Executive Director of the Hawaii  
Housing Authority; and Hawaii Housing Authority,  
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, Inc.;  
Halawa Hills Landsale Committee; Awakea Association;  
Alii Shores Community Association;  
Enchanted Hills, Unit I; Portlock Community Association  
(Maunaloa Beach);  
Kokohead Community Lease-Fee, Inc.;  
West Marina Community Association;  
Kalama Valley Community Association, Inc.;  
Maunaloa Triangle-Koko Kai Community Association, Inc.;  
Hahalione Valley Community Association, Inc.;  
Kamiloiki Community Association;  
Lunalilo Marina Community Association;  
Mariners Ridge and Cove Fee/Lease  
Conversion Committee;  
Spinnaker Isle Association;  
Waialae Iki Community Association;  
Waiau Community Association; Kahala Community  
Association, Inc.;  
Kahala Community Fee Purchase Fund and  
Halawa Valley Estates Fee Conversion Corporation,  
Intervenors-Appellees.



MEMORANDUM OF AMICUS CURIAE  
HERMAN LUM, ACTING ADMINISTRATIVE  
HEAD OF THE JUDICIARY OF THE  
STATE OF HAWAII

This amicus curiae memorandum is submitted on behalf of Herman Lum, Chief Justice Designate of the Supreme Court of the State of Hawaii,<sup>1</sup> in his capacity as Administrative Head of the judiciary of the State of Hawaii, opposing the issuance of federal injunctive relief against state court proceedings in the instant case.

A. INTEREST OF THE AMICUS CURIAE

As Chief Justice Designate of the Supreme Court of the State of Hawaii, amicus curiae Herman Lum is the Administrative Head of the state's judicial system. He is thus required by the state constitution and state statute to uphold the independence and sovereignty of the judiciary of the State of Hawaii. See Haw. Const. art. VI, § 6, Haw. Rev. Stat. §§ 601-2(a) and 2(b)(6). He is also responsible for the orderly processing of pending cases in the state court system and in charge of fiscal expenditures for the judiciary.

Initially, amicus curiae Herman Lum wishes to note that he does not appear here in his capacity as Chief Justice Designate of the Hawaii Supreme Court, and is not concerned with the merits of the case recently decided by the Ninth Circuit Court of Appeals in *Midkiff v. Tom*, No. 80-4368 (9th Cir. March 28, 1983). Rather amicus curiae appears as Acting Administrative Head of the judiciary of the State of Hawaii. In this capacity, amicus wishes to express his concern with this court's issuance of a temporary restraining order halting all state proceedings in-

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<sup>1</sup>Herman Lum was senior Associate Justice of the Hawaii Supreme Court upon his nomination by the Governor of Hawaii to be Chief Justice. The state senate has confirmed the nomination, and his swearing-in as Chief Justice is scheduled for April 26, 1983.

volving the same cause of action. Specifically, amicus submits that the issuance of any injunctive relief by this federal appellate court with regard to the ongoing state court proceedings is in conflict with the spirit if not the letter of the Anti-Injunction Act, 28 U.S.C. § 2283, violates the principles of "Our Federalism," and would have a serious adverse effect on the independence and practical day-to-day operations of Hawaii's state judicial system.

## B. QUESTION PRESENTED

The sole question this memorandum will discuss is whether any injunctive relief should be issued in the present case to stay ongoing state court proceedings.

## C. STATEMENT OF FACTS

### I. Overview of Cases in Hawaii Courts Addressing Constitutionality of State Leasehold Land Reform Legislation

#### A. The Bishop Estate's 1975 Declaratory Judgment Action (*Midkiff v. Amemiya*); Appeal to Hawaii Supreme Court; Dismissal of Constitutional Issues by Motion of the Bishop Estate in 1982.

On December 29, 1975 the Trustees of the Estate of Bernice Pauahi Bishop (hereinafter, "Bishop Estate" or "Trustees") filed a Complaint for Declaratory Judgment and Instructions in the Circuit Court of the First Circuit (*Midkiff v. Amemiya*, Civ. No. 47103). The action sought primarily a declaration on the constitutionality of Act 185 (1975) relating to leasehold rental negotiations and mandatory arbitration of disputes by the Hawaii Housing Authority. Defendants included the Hawaii Housing Authority and the lessees of certain residential lots in the Bishop Estate's Waialae Neighborhood Subdivision in Honolulu. Trial was held in July 1977.<sup>3</sup> The trial court

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<sup>3</sup>The trial, without a jury, was before then Circuit Judge Herman Lum.

upheld the constitutionality of the Act, issuing extensive findings of fact and conclusions of law on June 29, 1978. The Bishop Estate filed notices of appeal to the Hawaii Supreme Court on December 27, 1978 and January 9, 1979. (One month later, on February 9, 1979, the Bishop Estate commenced federal litigation by filing the complaint in *Midkiff v. Tom*, Civ. No. 79-0096 (D. Hawaii)). The record on appeal was docketed in the Hawaii Supreme Court on March 27, 1979 (No. 7294). After a lengthy briefing process the appeal was set to be argued before the supreme court on January 14, 1982. However on January 8, 1982 the court approved a motion filed that day by the lessees (accompanied by statements of no objection from the other parties) to postpone oral argument indefinitely in light of settlement negotiations. On April 7, 1982 the Bishop Estate filed a "Motion for Partial Dismissal of Appeal . . . on Grounds of Mootness", seeking to dismiss the constitutional issues from the appeal on the grounds that the Trustees had settled with all lessees in the action and that therefore the constitutional issues were now moot as between all real parties in interest. By order filed April 14, 1982 the supreme court granted the Bishop Estate's motion and reset for argument the sole remaining issue of attorneys' fees. That issue was subsequently resolved by memorandum opinion.

**B. State Condemnation Actions Brought by the Hawaii Housing Authority; Interlocutory Appeals to the Hawaii Supreme Court on the Constitutionality of the Land Reform Act (*Castle and Brown* cases); Remand for Further Trial on Public Use Issue.**

Numerous condemnation actions have been filed by the Hawaii Housing Authority pursuant to the Land Reform Act. Approximately 30 cases are currently scheduled for trial.

Under the provisions of Hawaii's general condemnation law, any party in a condemnation action may move for an "immediate trial, without a jury" on the issue of whether condemnation is for a "public use"; and an "interlocutory appeal . . . as a matter of right" lies from the trial court's ruling on the public use issue. Hawaii Rev. Stat. § 101-34. Pursuant to this section the lessee-defendants in *Hawaii Housing Authority v. Castle*, 65 Hawaii ....., 653 P.2d 781 (1982), appealed to the Hawaii Supreme Court from the trial court's finding that a condemnation under the Land Reform Act is for a public use. The supreme court stated, 65 Hawaii at ...., 653 P.2d at 782-83:

We are . . . being called upon to pass upon two questions of vast public import, i.e. whether a taking by eminent domain under the provisions of Chapter 516, HRS, is a "public use" within the meaning of . . . the Fifth Amendment to the Constitution of the United States and . . . Article I of the Constitution of the State of Hawaii.

Further, in a reference to Judge King's decision in *Midkiff v. Tom*, the *Castle* court implied that, even if Judge King's finding of a valid public use under the federal constitution is upheld in the higher federal courts, the Hawaii Supreme Court still will have to decide the question whether "public use" in the Hawaii constitution should be differently and more strictly construed. The *Castle* court stated:

Appellee HHA filed in the court below . . . the decision of the United States District Court for the District of Hawaii in a different case involving a different landowner. . . . [T]he decision of the United States District Court in question (which we understand is presently on appeal) may have precedential value with respect to the Constitution of the United States, but has no binding effect on us with respect to the Constitution of the State of Hawaii.

65 Hawaii at ....., 653 P.2d at 782. The *Castle* court ultimately concluded that the lower court record in that case was inadequate for purposes of deciding such major constitutional issues of first impression, and accordingly the case was remanded for a full trial on the public use issue.

In a similar interlocutory appeal raising the issue of public use under both the federal and state constitutions, the supreme court by unpublished memorandum opinion filed the same day as the *Castle* opinion remanded for further trial of the public use issue. *Hawaii Housing Authority v. Brown* (Civ. No. 60945, Sup. Ct. No. 8489).

The supreme court's opinions in *Castle* and *Brown* were issued on November 10, 1982. The public use trials for those cases have not yet commenced. However, in light of *Castle* and *Brown* the trial court in Civ. No. 63408, *Hawaii Housing Authority v. Midkiff*, determined that a trial on public use was required in that case. Such trial commenced in No. 63408 on March 14, 1983.

II. Effect of the Instant Temporary Restraining Order on the Trial in Civ. No. 63408, *Hawaii Housing Authority v. Midkiff*; Withdrawal of the Ancillary Extraordinary Writ Proceeding in the Hawaii Supreme Court (No. 9208, *Midkiff v. Greig*).

The Ninth Circuit's temporary restraining order effectively restrained the on-going public use trial in No. 64308, *Hawaii Housing Authority v. Midkiff*.

The complaint in No. 64308 had been filed on November 10, 1980. Defendant Bishop Estate had moved unsuccessfully for summary judgment on constitutional grounds, including public use arguments. In the fall of 1982 a jury trial on valuation was held over a period of several weeks, and the verdict was announced on November 3, 1982. One week later, as described *supra*, the supreme court's opin-

ions in *Castle* and *Brown* were issued, and the trial court in No. 64308 therefore ordered further proceedings on the public use issue. The public use trial commenced on March 14, 1983, litigating public use under both the federal and state constitutions as contemplated by *Castle*. Upon issuance of the Ninth Circuit's opinion in *Midkiff v. Tom* on March 28, 1983, the Bishop Estate asked the trial court in No. 64308 (Judge Greig) to stay its proceedings. Judge Greig denied a stay.

On April 4, 1983, the Bishop Estate filed in the Hawaii Supreme Court a Petition for Writ of Prohibition or for Writ of Mandamus (No. 9208; *Midkiff v. Greig*), seeking to prohibit the trial court from taking further action in No. 63408. Accompanying the petition was an "Ex Parte Motion for Temporary Stay." The petition and motion contended that the ongoing public use trial should be stopped immediately in light of the Ninth Circuit's opinion. More specifically, the petition briefly argued (1) that further trial proceedings were barred by *res judicata*; (2) that a stay would alleviate Petitioners' heavy trial expenses; (3) that "A Stay Will Prevent the Possible Divestiture of Trustees' Property Under the Provisions of a Law . . . Declared Unconstitutional"; and (4) that a stay would avoid duplicative or inconsistent adjudications. On April 6, 1983, two days after the filing of the petition and motion, the lessee defendants filed a memorandum in opposition to the "ex parte" motion, *inter alia* informing the supreme court that the Ninth Circuit on April 5, 1983 had issued a temporary restraining order effectively barring further prosecution of the trial in No. 63408. On April 7, 1983, prior to any action by the supreme court in the proceeding, the Bishop Estate withdrew the petition and motion, without prejudice to possible future renewal of the proceeding. The withdrawal documents were accompanied by brief affidavits stating that Judge Greig had recessed the trial in question until April 25, 1983 and that therefore the writ



and temporary stay were no longer necessary. In fact, the trial in No. 63408 had been brought to a halt by the Ninth Circuit's action.

## D. ARGUMENT

### I. *The Anti-Injunction Act*

Any discussion of the power and propriety of federal courts issuing injunctive relief against state court proceedings must begin with the Anti-Injunction Act, 28 U.S.C. § 2283. As one respected treatise has noted: "For almost as long as there have been federal courts, there has been a statutory prohibition against injunctions from federal courts restraining state court proceedings." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4221 (1978). That statutory prohibition states:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

The Anti-Injunction Act is clearly applicable to the instant case, since the state court proceedings in *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, were already under way when the federal temporary restraining order was issued. The question then becomes whether any of the three exceptions delineated in the Act is also applicable. The third exception—"to protect or effectuate its judgments"—appears to be the only possibility, since the "Congressional authorization" exception is not relevant, and the "necessary in aid of its jurisdiction" exception does not permit the issuance of federal injunctive relief against state court proceedings "merely because those proceedings interfere with a protected federal right . . . , even when the interference is unmistakably clear." *Atlantic Coast Line*

*Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 294 (1970).

It is true that the purpose behind the Act's third exception is to prevent the relitigation of matters which have already been fully adjudicated by a federal court. See 22 U.S.C. § 2283 (Reviser's Note). It is equally true, however, that having the power to stay state court proceedings under this third exception does not mean having to always exercise such power. Besides the "principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding," *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), the federal court must initially determine whether the usual equitable requirements of irreparable harm and lack of any adequate remedy at law are met. See generally *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

It is the position of amicus curiae that these equitable requirements, difficult enough to meet in the usual case, must be even more tightly construed where the injunctive relief would cross state-federal judicial lines. Amicus will not here discuss whether the equitable requirements are present in the instant case, but will note that the United States Supreme Court has declared that "[a]ny doubt as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. at 297.

Perhaps even more important than the language and long existence of the Anti-Injunction Act, however are the principles and policies behind it. The Supreme Court has observed that "the consistent understanding has been that its basic purpose is to prevent 'needless friction between state and federal courts.'" *Mitchum v. Foster*, 407 U.S.

at 232-33 (quoting *Oklahoma Packing Co. v. Gas & Electric Co.*, 309 U.S. 4, 9 (1939)). This "basic purpose" is one shared by the abstention doctrine,<sup>3</sup> and fueled by the concept commonly known as "Our Federalism."

## II. "Our Federalism"

The concept of "Our Federalism" may well be as old as the Republic itself, but it was not fleshed out until 1971, when the United States Supreme Court held that federal courts may not interfere with ongoing state criminal proceedings. As Justice Black wrote for the majority in *Younger v. Harris*:

What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. 37, 44 (1971).

The Court in *Younger* also described the concept of "comity" as

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

*Id.*

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<sup>3</sup>Amicus is not here concerned with whether the federal courts should have abstained from passing on the merits of the instant dispute. Amicus' concern is limited to the question of whether our state courts should be precluded from entertaining and resolving the same dispute. This is where amicus believes the principles and policies underlying and shared by the Anti-Injunction Act and the abstention doctrine are relevant and compelling.

Whether called "Our Federalism" or "comity," the overriding consideration of the Supreme Court in *Younger* and its progeny is clear: avoiding unnecessary federal interference with the state judicial process. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). It is a fundamental consideration which, amicus submits, is sufficiently compelling in the instant case to preclude the issuance of any federal injunctive relief against ongoing state court proceedings.

### III. *Administrative Concerns of the State Judiciary*

In addition to the basic principles common to the Anti-Injunction Act and "Our Federalism," the instant case involves administrative problems of a more practical, but just as important, nature. For one thing, an injunction now could eventually disrupt the orderly processing of pending cases in our state court system involving the same subject matter, of which about thirty are already scheduled for trial. Needless to say, that would work a substantial hardship on our court calendars, which in turn would directly affect the efficiency of our state judicial system. Moreover, the instant parties, other parties similarly situated, and the Hawaii state court system have already spent an enormous amount of time, expense, and manpower addressing the precise issues decided by the Ninth Circuit in *Midkiff v. Tom*. And finally, in the event the United States Supreme Court eventually upholds the Hawaii Land Reform Act under the federal constitution, there would have to be a retrial in the ongoing state court proceeding and a decision on the merits by the Hawaii Supreme Court with respect to the state constitutional issues.

Injunctive relief is an equitable remedy and thus an extraordinary one; it is even more so when issued by a federal court against ongoing state court proceedings. Inasmuch as it would also constitute a serious interference with the effective operations and independence of Hawaii's

state judiciary, which amicus is bound to administer and uphold, amicus curiae submits that such injunctive relief is unnecessary and unwarranted in the instant case.

### E. CONCLUSION

For the reasons stated above, amicus curiae Herman Lum, Chief Justice Designate and Acting Administrative Head of the judiciary of the State of Hawaii, opposes the issuance of federal injunctive relief in this case against ongoing state court proceedings.

DATED: Honolulu, Hawaii, April 12, 1983.

Respectfully submitted,

H. LUM

HERMAN LUM

Chief Justice Designate and  
Acting Administrative Head  
of the Judiciary of the  
State of Hawaii

**Appendix M**

**United States Court of Appeals  
For the Ninth Circuit**

**No. 80-4368**

**Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,**

**vs.**

**Paul A. Tom, et al.,  
Defendants-Appellees.**

**[Filed June 17, 1983]**

**ORDER**

**Before: ALARCON, FERGUSON and POOLE, Circuit  
Judges.**

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for the appropriateness of rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and a majority of the judges of the court in regular active service have voted not to grant rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Joint Motion to Withdraw the Petition for Rehearing and Suggestion for Rehearing En Banc is dismissed as moot.

The several Notices of Withdrawal of the above Joint Motion are dismissed as moot.



**Appendix N**

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United States Court of Appeals  
For the Ninth Circuit

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No. 80-4368, DC CV 79-0096 SK

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Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,  
Matsuo Takabuki and Myron B. Thompson, Trustee  
of the Kamehameha Schools/Bishop Estate,  
Plaintiffs/Appellants,

vs.

Paul A. Ton, Tony Taniguchi, Wilbert K. Eguchi,  
Wayne T. Takahashi, et al.,  
Defendants/Appellees,

and

Wai-Kahala Tract "H" Association, Inc.,  
Halawa Hills Landsale Committee;  
Awakea Association; et al.,  
Intervenors/Appellees.

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**JUDGMENT**

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Appeal from the United States District Court for the  
District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the  
Record from the United States District Court for the Dis-  
trict of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and ad-  
judged by this Court, that the judgment of the said District  
Court in this Cause be, and hereby is reversed and re-  
manded.

Filed and entered March 28, 1983.

**Appendix O**

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No. 80-4368

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United States Court of Appeals  
For the Ninth Circuit

---

Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,

vs.

Paul A. Tom, et al.,  
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, et al.,  
Intervenors-Appellees.

[Filed July 15, 1983]

Notice of Appeal  
and  
Certificate of Service

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United States Court of Appeals  
For the Ninth Circuit

Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,

vs.

Paul A. Tom, et al.,  
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, et al.,  
Intervenors-Appellees.

NOTICE OF APPEAL

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated March 28, 1983, under 28 U.S.C. § 1254 (2). Rehearing and rehearing *en banc* were denied in this case on June 17, 1983.

Dated: Honolulu, Hawaii, July 14, 1983.

/s/ Laurence H. Tribe  
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Defendants-Appellees

**Certificate of Service**

I hereby certify that true and correct copies of the foregoing document were duly mailed on July 14, 1983, to the attorneys of record.

**Dated: Honolulu, Hawaii, July 14, 1983.**

**/s/ Laurence H. Tribe**

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A-263

**Appendix P**

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No. 80-4368

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United States Court of Appeals  
for the Ninth Circuit

---

U.S. District Court for the District of Hawaii

Civil No. 79-0096

---

Frank E. Midkiff, et al.,  
Plaintiff-Appellant,

vs.

Paul A. Tom, et al.,  
Defendants-Appellees,  
and

Wai-Kahala Tract "H" Association, et al.,  
Intervenors-Appellees.

---

[Filed July 15, 1983]

Appeal from Final Judgment

Notice of Appeal to the Supreme Court  
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Valley Community Asso-  
ciation, Inc.**



A-265

No. 80-4368

---

United States Court of Appeals  
for the Ninth Circuit

---

U.S. District Court for the District of Hawaii  
Civil No. 79-0096

---

Frank E. Midkiff, et al.,  
Plaintiff-Appellant,  
vs.

Paul A. Tom, et al.,  
Defendants-Appellees,  
and

Wai-Kahala Tract "H" Association, et al.,  
Intervenors-Appellees.

---

Appeal from Final Judgment

Notice of Appeal to the Supreme Court  
of the United States

Notice is hereby given that Portlock Community Association (Maunaloa Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc., Intervenors-Appellees above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on March 28, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 14, 1983.

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Dated: Honolulu, Hawaii, July 14, 1983

/s/ Corey Y. S. Park

**Appendix Q**

**In the United States Court of Appeals  
For the Ninth Circuit**

**No. 80-4368**

**USDC Civil No. 79-0096**

**Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,**

**vs.**

**Paul A. Tom, et al.,  
Defendants-Appellees,**

**and**

**Wai-Kahala Tract "H" Association, Inc., et al.,  
Intervenors-Appellees.**

**[Filed July 19, 1983]**

**Notice of Appeal to the Supreme Court  
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**(Certificate of Service Attached)**

**In the United States Court of Appeals  
For the Ninth Circuit**

---

**No. 80-4368**

**USDC Civil No. 79-0096**

---

**Frank E. Midkiff, et al.,  
Plaintiffs-Appellants,**

**vs.**

**Paul A. Tom, et al.,  
Defendants-Appellees,**

**and**

**Wai-Kahala Tract "H" Association, Inc., et al.,  
Intervenors-Appellees.**

---

**Notice of Appeal to the Supreme Court  
of the United States**

Notice is hereby given that the Kahala Community Assn., Inc., et al., Intervenors-Appellees in this case, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Ninth Circuit entered March 28, 1983, rehearing denied by order dated June 17, 1983, reversing the Judgment of the United States District Court for the District of Hawaii entered June 10, 1980.

**Frank E. Midkiff, et al., vs. Paul A. Tom, et al.,**

**No. 80-4368**

**Notice of Appcal to the Supreme Court of the United  
States**

**This appeal is taken pursuant to 28 U.S.C. § 1254(2).**

**Dated: Honolulu, Hawaii, July 18, 1983.**

**/s/ A. Bernard Bays**

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Certificate of Service

I hereby certify that a copy of the within was duly served upon each of the following attorneys and/or parties by hand delivering said copy on July 18, 1983 addressed as follows:

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OCT 3 1983

No. 83-236

ALEXANDER L. STEVENS,  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,  
v. *Appellants,*

FRANK E. MIDKIFF, *et al.*,  
*Appellees.*

On Appeal from the United States Court  
of Appeals for the Ninth Circuit

**MOTION TO AFFIRM**

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## QUESTIONS PRESENTED

Appellees respectfully submit that the only questions properly before this Court are the following: \*

1. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of that title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots for which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation; (c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the State only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained title.

2. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine, (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that any exercise of the state's eminent domain authority "is

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\* The various appellants in Nos. 83-141, 83-236 and 83-283 cannot agree as to what the Questions Presented are and have set forth three different sets of such questions. See the Jurisdictional Statement of the Hawaii Housing Authority *et al.* (hereinafter "HHA JS") at i; the Jurisdictional Statement of the Kahala Community Association *et al.* (hereinafter "Kahala JS"), at 1; and the Jurisdictional Statement of the Portlock Community Association *et al.* (hereinafter "Portlock JS") at i.

for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation;

(b) under the *Younger* doctrine, (i) the State never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law;

(c) under the *Burford* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) appellees raised substantial federal constitutional claims under 42 U.S.C. § 1983 in their complaint; (iii) there was no question of whether the State had the purported authority, under state law, to condemn appellees' property; and (iv) the State had not established a specialized court system to resolve state condemnation suits; and

(d) under the *Colorado River* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) there was no federal statute counseling in favor of state court litigation; (iii) plaintiffs' claims were based upon federal law; (iv) the federal suit preceded the filing of any state court suit; (v) abstention would have inevitably have lead to piecemeal litigation; and (vi) there was no inconvenience to the parties in litigating this case in federal court.\*\*

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\*\* If probable jurisdiction is noted, appellees will also address the following questions which were presented to, but did not have to be decided by, the Court of Appeals:

3. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by imper-

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missibly delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 1 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-236

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PORTLOCK COMMUNITY ASSOCIATION, *et al.*,  
v. *Appellants,*  
FRANK E. MIDKIFF, *et al.*,  
*Appellees.*

---

On Appeal from the United States Court  
of Appeals for the Ninth Circuit

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**MOTION TO AFFIRM**

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Pursuant to Rule 16 of the Rules of this Court, appellees Frank E. Midkiff, *et al.* (hereinafter "Trustees"), move that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed on the ground that the judgment is plainly correct and the challenge to it so insubstantial as to warrant no further review.

**STATEMENT**

Trustees recite here only those facts relevant to the Court's consideration of appellants' arguments on abstention. For a fuller discussion of the underlying facts, we invite the Court's attention to the Statement in our Motions to Affirm in Nos. 83-141 and 83-283, which is incorporated herein by reference.

**A. Background.**

The initial version of Chapter 516 was enacted as Act 307 in 1967.<sup>1</sup> For nearly a decade the statute lay dor-

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<sup>1</sup> 1967 Haw. Sess. Laws, Act 307 (hereinafter "Act 307").

mant,<sup>2</sup> in part due to unanswered questions regarding its constitutionality,<sup>3</sup> and in part due to the continuance of low rents fixed at the inception of the lease terms.<sup>4</sup> After a series of liberalizing amendments to improve the lessees' litigation position, the HHA began administrative proceedings in 1978 that, if uninterrupted, would ultimately have led to the involuntary condemnation of Trustees' fee title in various lots. These included a direction that Trustees submit to mandatory arbitration for *prima facie* determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in

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<sup>2</sup> Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (Preliminary Injunction Hearing, April 24-27, 1979 (Tr. 217)).

<sup>3</sup> Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality. Trustees filed two such actions in 1967 (*Midkiff v. Hasegawa*, No. 4727, and *Midkiff v. McCormack*, No. 4728) and another residential lessor filed a similar action (*Davis v. Finance Realty*, No. 4735). The HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than they could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on grounds, among others, that it provided for taking private property for non-public purposes. This, too, was dismissed without prejudice. *State v. Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

<sup>4</sup> In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or arbitrated at the end of the fixed rent period. Rents fixed in many household tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing the fee title.

Honolulu for the taking of the fee simple title.<sup>6</sup> Under state law, none of these administrative proceedings was part of any later-filed state court condemnation suit; Haw. Rev. Stat. § 516-51(b) explicitly states that "[t]his mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain."<sup>6</sup> Rather than submit to mandatory arbitration, Trustees instead brought the present action for injunctive and declaratory relief.

### **B. The Proceedings Below.**

1. Before any state court condemnation suits were filed against them, Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.<sup>7</sup> In its answer, HHA raised only the rationale

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<sup>6</sup> Decision on Motion for Preliminary Injunction (HHA JS App. A102 n.52). Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew its intervention in this lawsuit.

<sup>6</sup> After the District Court had ruled that the mandatory arbitration provisions were unconstitutional, the legislature amended this section to substitute the term "preliminary negotiations" for the term "mandatory arbitration" (1980 Haw. Sess. Laws, Act 107, § 3; HHA JS A131-A132).

<sup>7</sup> Trustees' complaint asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint also alleged that the statute does not vest power in the state or its agency, the HHA, to make the essential determination as to which, if any, lots should be taken; but, rather, unconstitutionally delegates that power to lessees. Further, it alleged that the statute contravenes the Contract Clause of the Constitution because it abrogates the terms of pre-existing lease contracts (Record Excerpts in the Court of Appeals ("RE"), 10-14).

Finally, the complaint asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute. These, as noted below, were held unconstitutional by the District Court and are not in issue before this Court.

of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), as a basis for abstention, and did not assert that any other abstention doctrine was appropriate.<sup>8</sup> Several private organizations, representing lessees of appellees' property, later intervened.<sup>9</sup> Like HHA, the only abstention doctrine adverted to in the answers (filed on behalf of some, not all, of the intervenors) was *Pullman* abstention (RE 67). Furthermore, intervenors admitted in their answers what Chapter 516 itself makes clear: that the administrative proceedings antedating the filing of appellees' suit in federal court were "not part of any action in condemnation or eminent domain" (RE 60).

2. At the time Trustees filed their suit, there were no pending state court proceedings involving the constitutionality of Chapter 516. The Ninth Circuit's express finding to this effect (HHA JS App. A2-A4 n.1) is plainly correct. The case cited by Portlock (Portlock JS 6-7) involved a challenge to a different statute, Haw. Rev. Stat. § 519-2, Hawaii's rent control law, which is *not* a part of the so-called Land Reform Act.<sup>10</sup> Trustees could not

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<sup>8</sup> Paragraph 18 of HHA's answer stated:

This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint. [RE 52.]

HHA later made clear, in its opposition to appellees' motion for a preliminary injunction, that the *only* abstention doctrine about which it was concerned, and which it presented to the District Court, was *Pullman* (see State Defendants' Memorandum In Opposition To Plaintiff's [sic] Motion For Preliminary Injunction (filed Apr. 19, 1979), pp. 82-87).

<sup>9</sup> On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene. Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions.

<sup>10</sup> Judge Lum's "extensive findings of facts" have no collateral estoppel or other legal effect. While on appeal, the case was



have earlier raised their constitutional claims in either of the two cases cited by HHA (HHA JS 6-8), because the Wai-Kahala Tract "H" suit was not filed until September 21, 1979, months after the preliminary injunction was entered by the District Court, and the Kamiloiki Valley suit was not filed until November 10, 1980, after more than another year had passed.<sup>11</sup>

3. The District Court, on February 28, 1979, issued a temporary restraining order against HHA enforcement of the Act (HHA JS App. A78 & n.5), which it modified on March 27, 1979, so as to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (*id.*). Trustees later moved for a preliminary injunction against the further enforcement of Chapter 516. Again, in their oppositions to Trustees' motion, the only abstention doctrine adverted to by HHA and intervenors was *Pullman* (see note 8, *supra*). After a hearing, the District Court handed down its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered on June 8, 1979.<sup>12</sup> There were still no state court condemna-

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rendered moot and the judgment was vacated. Judgment on Appeal filed on May 18, 1982, in *Midkiff v. Amemiya*, No. 7294 (Haw. Sup. Ct.).

<sup>11</sup> Contrary to the assertions (HHA JS 6) that Wai-Kahala Tract "H" "had been designated for acquisition by HHA on October 20, 1978" and that this "designation" had been "appealed," the HHA merely passed the resolution preliminarily, concluding that designation would effect the purposes of the Act and requesting the lessor and lessees to negotiate the price to be paid. The actual designation did not occur until September 21, 1979, immediately preceding the filing of the suit. The "appeal" was an attempt by the Wai-Kahala Tract "H" lessees to force Trustees into an arbitration in District Court which was later held unconstitutional.

<sup>12</sup> The preliminary injunction permitted condemnation of the fee simple title to leasehold lots, but restrained compulsory arbitration and exclusive use of the valuation formulae provided by the statute.

tion proceedings involving Trustees filed even by this time.<sup>13</sup>

Thereafter, HHA and intervenors abandoned even the very limited abstention argument they had made previously. Without claiming that abstention was appropriate for *any* reason, and prior to the filing of any state court proceedings involving Trustees, they filed motions for partial summary judgment asking the District Court to uphold the constitutionality of the statute on the basis of the legislative findings. Without affording Trustees an opportunity to present any evidence to the contrary, the District Court filed its decision upholding the constitutionality of the statute.<sup>14</sup> Trustees appealed.

4. No appellant initially argued to the Court of Appeals that abstention was required under any theory; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After requesting and receiving post-argument briefing on this issue—in which both HHA and Kahala argued that abstention was *unwarranted* for *any* reason and asked the Court of Appeals to reach the merits of Trustees' claims—a majority of the Court of Appeals concluded that abstention would have been improper (HHA JS App. A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).<sup>15</sup> On the merits, the

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<sup>13</sup> The earliest condemnation suits against Trustees were filed in September 1979 (HHA JS App. A30 (Poole, J.)).

<sup>14</sup> The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*) Finally, the District Court granted the HHA and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980.

<sup>15</sup> First, the Court ruled that abstention was unnecessary under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), because in light of the clear statement of legislative intent in Haw. Rev. Stat. § 516-83(a)(12), there was no uncertain issue of state law, only

court ruled that Chapter 516 violated the Public Use Clause because the Act did not forward any purpose other than to transfer land from one party to another, and this purpose was barred by the Public Use Clause.<sup>16</sup>

### C. The Events Following the Court of Appeals' Decision.

Following the entry of the court's decision on March 28, 1983, Trustees sought to stay any further state court proceedings. At that time, Trustees were faced with the prospect of entry of judgment, and the consequent, potentially-irreversible transfer of their property in an ongoing state court suit begun after Trustees had obtained preliminary injunctive relief from the District Court. *Hawaii Housing Authority v. Midkiff*, Civil No.

the question of whether Chapter 516 was constitutional (HHA JS App. A2-A4 n.1; *id.* at A23-A24 (Poole, J.)).

*Second, Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), did not require abstention because Hawaii had not funnelled all condemnation suits (and challenges thereto) into a single specialized court, and there was no question, inseparable from the federal claims, of whether the state had authority to effect these condemnations (HHA JS App. A2-A4 n.1; *id.* at A24-A25 (Poole, J.)).

*Third, Younger v. Harris*, 401 U.S. 37 (1971), did not require abstention because there were no state court proceedings pending at the time the District Court had entered a temporary restraining order (February 28) and, later, a partial preliminary injunction (June 8), since HHA did not file its first eminent domain suit against Trustees in state court until September 1979 (HHA JS App. A2-A4 n.1). Judge Poole also concluded that the State had waived any claim that *Younger* was applicable by failing to invoke that doctrine in the District Court or Court of Appeals (HHA JS App. A26-A31).

*Finally*, Judge Poole concluded that *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976), was inapplicable because of the absence of any exceptional circumstances, such as the McCarran Amendment, favoring state court litigation (HHA JS App. A25-A26).

<sup>16</sup> Because of the Court's ruling, it did not consider Trustees' other arguments.

63408 (Haw. Cir. Ct.). Trustees first sought relief in the state courts, from both the Circuit Court in the above case, and from the Hawaii Supreme Court, but all efforts proved futile.<sup>17</sup> Trustees also sought an injunction from the Court of Appeals staying the ongoing state court trial pending issuance of the mandate. On April 14, the Court of Appeals declined to enjoin the above state court condemnation suit *pending issuance of the mandate* because the court was unwilling to "presum[e] that the Courts of Hawaii under the Supremacy Clause of the United States Constitution, and in light of this Court's decision of March 28, 1983, will fail to discharge their obligation with respect to the rights of appellants." *Midkiff v. Tom*, No. 80-4368 (Apr. 14, 1983), slip op. at 2. Later events demonstrated beyond any doubt, however, that this presumption was unjustified.

The Court of Appeals' mandate issued on June 27, 1983, and the District Court set a hearing for July 8, 1983, on Trustees' motion for entry of final judgment, which the District Court later continued, on HHA's motion, until July 15, 1983. On that day, just prior to the hearing, HHA filed two more condemnation suits involving an additional 727 of Trustees' residential subdivisions. By this time, more than 4,000 of Trustees' lots were at risk. At the July 15 hearing, Trustees introduced uncontroverted evidence that HHA intended to proceed with further condemnation suits against their property as if the Court of Appeals had never issued its March 28 decision. Moreover, counsel for HHA and

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<sup>17</sup> See *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Mar. 30, 1983) (oral bench ruling denying Trustees' motion for a stay); *Midkiff v. Grieg*, No. 9208 (Haw. Sup. Ct. Apr. 21, 1983) (*mem.*) (order denying Trustees' Amended Petition for a Writ of Prohibition or for Writ of Mandamus and Amended Ex Parte Motion for Temporary Stay); *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Apr. 28, 1983) (order denying Trustees' Motion to Dismiss or, in the alternative, to Reconsider Trustees' Motion to Stay Proceedings).

intervenors conceded that this was their very intent. Notwithstanding Trustees' proof, and HHA's admission, that appellants fully intended to disregard the Court of Appeals' March 28 decision, the District Court denied Trustees' motion for a permanent injunction (Transcript of July 15, 1983, Hearing Before the District Court, at 82-83).<sup>18</sup>

Four days later, on July 19, Trustees filed a motion with the Court of Appeals seeking recall and clarification of its June 27 mandate. After receiving further briefing from the parties, the Court of Appeals, on August 11, 1983, issued an order recalling its mandate. *Midkiff v. Tom*, No. 80-4368, slip op. at 1-2. Observing that "[t]he district court has indicated uncertainty as to our intention set forth in the opinion" (*id.* at 1), which was the reason its judgment had not been "implemented" (*id.*), the Court of Appeals recalled its mandate and set an expedited briefing schedule for the parties to address the appropriate form of the decree to be issued (*id.*). Pending issuance of that revised mandate, the court enjoined HHA, intervenors, and related parties from pursuing any ongoing or future condemnation suits under Chapter 516 (*id.* at 2).

Without awaiting the issuance of that revised mandate, appellants sought a stay of the Court of Appeals' August 11 Order from Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit. On September 2, he denied appellants' application. *Hawaii Housing Authority v. Midkiff*, No. A-113 (in Chambers). The Court of Appeals thereafter reset an expedited briefing schedule on

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<sup>18</sup> The District Court gave two reasons for that ruling. First, it relied upon HHA's representation that it would not permit title to pass in *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct.). Second, the court relied upon the Court of Appeals' decision, handed down on April 14 *before* the mandate had issued, declining to award Trustees an injunction pending its issuance because of the Court of Appeals' assumption that the Hawaii state courts would respect its judgment (*see* page 8, *supra*).

Trustees' motion to recall and clarify the mandate. No decision has yet been rendered.

### SUMMARY OF ARGUMENT<sup>19</sup>

1. HHA's and Portlock's claims that the courts below should have abstained are untimely, and therefore should not be considered by this Court. HHA had never claimed until now that *Younger*, *Burford*, or *Colorado River* were at all applicable to this case. To the contrary, HHA explicitly disavowed any reliance upon these doctrines before the Court of Appeals, and asked that court to reach the merits of Trustees' claims. HHA did invoke *Pullman* in its answer to Trustees' complaint, but abandoned that claim thereafter, declining to reassert it before the Court of Appeals. In fact, HHA also argued, as it did with respect to the other abstention doctrines, that *Pullman* abstention was unjustified. Therefore, HHA should not now be permitted to champion claims that it expressly disavowed below.

Portlock has also sought to assert abstention claims for the first time in this Court. Portlock did not claim in its answer or in its initial brief to the Court of Appeals that abstention was appropriate for any reason. Thereafter, Portlock only claimed that *Younger* was applicable in a post-argument brief after the Court of Appeals requested briefs on abstention.

2. The Ninth Circuit's narrow holding that abstention was inappropriate is manifestly correct and does not warrant further review by this Court. That decision does not conflict with any decision of this Court or any other federal court. The court applied well-established precedent in two comprehensive opinions giving detailed consideration to all the arguments made below and repeated here by appellants. Thereafter, the full Court of

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<sup>19</sup> Only HHA and Portlock have argued that abstention was appropriate in this case (HHA JS i, 23-27; Portlock JS i, 20-24). Kahala has not presented any abstention question, or supporting argument, in its jurisdictional statement.



Appeals denied *en banc* review. The court's application of the law to the unique facts of this case does not warrant further review.

(a) *Pullman* abstention is inappropriate because Chapter 516 clearly identifies takings accomplished thereunder as serving a public use, and therefore no ambiguity or opportunity for a different interpretation is present. *Younger* does not require abstention for several reasons. Not only did HHA never claim that *Younger* was applicable (and, instead, sought a federal judicial decision on the merits), but the intervenor-lessees do not have standing to assert this claim. In any event, there were no pending state court proceedings at the time appellees filed this suit, or even at the time the District Court issued a temporary restraining order and, later still, a partial preliminary injunction. By these later points in time, the District Court had clearly undertaken proceedings of substance on the merits of Trustees' federal claims, and abstention under *Younger* would have been error. In fact, allowing appellants not only to acquiesce in federal court jurisdiction but to actively seek a decision on the merits, and then permitting them to claim that the federal courts should not have been involved from the beginning, would create utter chaos in the relations between federal and state courts.

(b) The Court of Appeals' conclusions that neither *Burford* nor *Colorado River* required abstention not only are plainly correct, but also went unchallenged by the dissent below. None of the preconditions for application of these doctrines is present here, where Trustees asserted substantial federal constitutional claims (under 42 U.S.C. § 1983 (1976 & Supp. V 1981)), rather than rely solely upon diversity jurisdiction; Trustees have never challenged HHA's statutory authority to condemn their land; there is no specialized court system for resolution of Chapter 516 questions; and there is no federal statute exhibiting a special solicitude for state court eminent domain decisions.



### ARGUMENT

So as not to unduly burden the Court, Trustees will not repeat here the Argument already made in their Motions to Affirm in Nos. 83-141 and 83-283 in regard to correctness of the ruling below on the constitutionality of Chapter 516. The Argument is instead incorporated herein by reference. Trustees will address in this Motion only appellants' arguments relating to abstention.

#### THE COURT OF APPEALS' NARROW DECISION IS MANIFESTLY CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS ON ABSTENTION.

In this case, the Court of Appeals was plainly correct in concluding that abstention would have been improper (HHA JS A2-A4 n.1; *id.* A22-A31 (Poole, J.)). No one has seriously questioned the Court of Appeals' judgment that *Pullman* and *Colorado River* are inapposite, and appellants' arguments that *Burford* or *Younger* abstention is required must also fail.

#### A. *Pullman*.

It is well-settled that *Pullman* abstention is appropriate only where a state court resolution of an uncertain question of state law may moot or substantially alter the posture of a federal constitutional question.<sup>30</sup> There is no uncertain state-law question here. As the Court of Appeals observed, Haw. Rev. Stat. § 516-83(a)(12) is "perfectly clear" and "unambiguously states" that "[t]he use of the power to eminent domain [under Chapter 516] is for a public use and purpose" \* \* \* (HHA JS App. A2-A4 n.1 (quoting § 516-83(a)(12))).

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<sup>30</sup> *E.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Wisconsin v. Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler v. Koota*, 389 U.S. 241, 249-251 (1967).

No appellant has ever cited any provision of Chapter 516 suggesting that Section 516-83(a)(12) (or (10)) does not mean exactly what it says, or any provision of that *existing* Act—rather than ones Hawaii has never enacted—in any way negating or lessening the plain language of Section 516-83(a)(12) (or (10)).<sup>21</sup> Accordingly, the Court of Appeals' conclusion that "there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use" (*id.*; see *id.* A23-A24 & n.2 (Poole, J.)) is inescapable.<sup>22</sup>

Instead, HHA alone argues (HHA JS 24-25) that the possibility of a state court decision invalidating Chapter 516 on state constitutional grounds requires abstention. But this Court has twice rejected the argument that *Pullman* requires abstention, notwithstanding an unambiguous state law, simply because of the hypothetical possibility that state courts might invalidate a state statute under the state, rather than the federal Constitution. *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau*, 400 U.S. at 437-439. Under the contrary rule, *Pullman* abstention would be appropriate in every case because, as HHA admits (HHA JS 24 & n.61), state courts can always invalidate state laws on state constitutional grounds, thereby "convert[ing] abstention from an exception into a general

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<sup>21</sup> To the same effect is Haw. Rev. Stat. § 516-83(a)(10) ("The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii"; HHA JS App. A139). See also §§ 516-83(a)(11), (13); § 516-83(b); HHA JS App. A139-140.

<sup>22</sup> In fact, any such contention would be plainly inconsistent with HHA's insistence that "[t]he legislature concluded \* \* \* that the Act would realize public purposes and put land to public use" (HHA JS 4; footnote omitted).

rule." *Examining Board*, 426 U.S. at 598 (footnote omitted).

Finally, the fact that an Hawaii state court is not likely either to interpret Chapter 516 in some unique way or render it unconstitutional under the state Constitution is borne out by the only state court decision extant on the subject. This decision, of course, was rendered by Judge Greig of the Hawaii Circuit Court in *Hawaii Housing Authority v. Midkiff*, Civil No. 63408, well after the trial and appellate proceedings on the merits had been concluded in the federal courts.<sup>23</sup> But while Judge Greig disagreed with the Court of Appeals respecting the constitutionality of Chapter 516,<sup>24</sup> he did not interpret the statute differently, nor did he find it in conflict with the Hawaii Constitution. Thus, any argument as to what the state courts might do with Chapter 516 that would render the federal courts' decision moot becomes so speculative as to lose meaning.<sup>25</sup>

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<sup>23</sup> Findings of Fact and Conclusions of Law entered September 6, 1983.

<sup>24</sup> Judge Grieg entirely ignored the Court of Appeals' opinion. His findings of fact and conclusions of law contain no reference whatsoever to the Ninth Circuit's judgment declaring the condemnation provision of Chapter 516 facially unconstitutional, nor any reference to Trustees' defense that that judgment was *res judicata* upon the federal constitutional issues.

<sup>25</sup> Moreover, none of the reasons given by the dissent in the Court of Appeals for *Pullman* abstention can pass muster.

*First.* The argument that the federal constitutional question need not be reached if the State can regulate the lessees' post-acquisition use of their new leaseholds hypothecates state-court interpretations of a statute Hawaii has *never* enacted, and simply fails to address the particular statute at issue here. No provision of the *existing* Act so regulates lessees' post-acquisition use—a point which was noted by the Court of Appeals majority (*see, e.g.*, HHA JS App. A17-A18; *id.* A32-A33, A36 (Poole, J.)) and not denied by the dissent. *Pullman* does not require a federal court

### B. Younger.

There is no *Younger* issue in this case.

1. First, HHA may not raise any *Younger* claim at this late date. HHA has *never* before argued that *Younger* abstention is appropriate—whether to the District Court, the panel in the Court of Appeals, or the Ninth Circuit *en banc*. Therefore, HHA may not raise this issue for the first time in this Court. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (*per curiam*) (specifically applying this rule to *Younger*).<sup>26</sup> Application of that rule is appropriate notwithstanding the state interests *Younger* protects. In a parallel context, the Court has refused to permit the State to protect already-entered judgments of conviction in criminal cases by invoking

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to await a state court interpretation of an as-yet-unenacted state law before considering a federal constitutional claim.

*Second.* The “possibility of a constitutional construction of the statute” referred to by the dissent below (HHA JS App. A48) is based upon the dissent’s interpretation of the federal Constitution, not Chapter 516 (*id.*, referring to dissent at A53-A60). A federal court may not abstain under *Pullman*, however, simply to give a state court the first opportunity to rule on a federal constitutional question. *Zwickler v. Koota*, 389 U.S. at 250-251 & n.14, and cases cited therein.

*Third.* The distinction drawn by the dissent in the Court of Appeals between cases involving racial or gender discrimination and land use (HHA JS App. A48-A49) is based entirely upon an earlier *dissenting* opinion by the same author (*id.* at A49), is contrary to well-established precedent (*e.g.*, *Harrison v. NAACP*, 360 U.S. 167 (1959); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4242, at 465 (1978) (“it is clear that there is no rule to this effect”)), and overlooks the fact that the Trustees too have raised a claim protected by the Fourteenth Amendment.

<sup>26</sup> *Vance* is simply an application to *Younger* of the general rule that a party-appellant may not raise in this Court an issue not raised below. *E.g.*, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); R. Stern & E. Grossman, *Supreme Court Practice* (5th ed. 1978), p. 457, and cases cited therein.

*Wainwright v. Sykes*, 433 U.S. 72 (1977), for the first time in this Court. *E.g.*, *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980).<sup>27</sup> It is manifest that the state interests underlying *Sykes* are equal to, if not greater than (because of the additional interest in finality), those underlying *Younger*. Compare *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982), and *Sykes*, 433 U.S. at 89-91, with *Younger*, 401 U.S. at 43-49. Therefore, requiring HHA to demonstrate its need for *Younger* by invoking that doctrine in the lower federal courts is entirely appropriate.

Equally important, permitting the state to oust a federal court of jurisdiction *after* that court has decided the merits of a party's claim adversely to the state, will necessarily entail the same costs to the judicial process as this Court spoke of in *Sykes*. In that case, this Court acknowledged that forcing a state criminal defendant to assert his federal claims at trial served a variety of institutional interests: it contributed to the accuracy and finality of judgments, prevented a party from "'sandbagging'" a *nisi prius* state court by withholding a potentially dispositive matter until after an adverse judgment, conserved scarce judicial resources, and promoted respect for the state court judgments entered after a trial on the merits. 433 U.S. at 88-91. Those considerations are equally applicable in this parallel context. Permitting the state to withhold a *Younger* claim until after losing on the merits of a federal court's decision will entail the same institutional costs this court found unjustified in *Sykes*. The only difference is that the federal courts will suffer the disrespect attendant upon having their judgments set at naught, a distinction that, of course, makes

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<sup>27</sup> See also *Hopkins v. Jarvis*, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (state's failure to contest state prisoner's alleged exhaustion of state court remedies constitutes waiver of right to contest exhaustion on appeal); *Brown v. Fogel*, 387 F.2d 692, 695 (4th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968) (same).

no logical difference in terms of the costs involved, and one that would belittle the role of federal courts in protecting federal rights.

There is no question that the state can waive any claim under *Younger* (see *Kolender v. Lawson*, 103 S. Ct. 1855, 1857 n.3 (1983); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977)), and there is no good reason to relieve HHA from its failure to raise *Younger* in a timely and proper fashion. In light of the State's oft-acknowledged concern that Chapter 516 would be challenged as violating the Public Use requirement of the Eminent Domain Clause (as, indeed, the state itself had once claimed, see note 3, *supra*), HHA was well aware of the possibility that a party whose property it sought to condemn would challenge the Act on federal constitutional grounds. In fact, HHA concedes in its jurisdictional statement that it was well aware of appellees' intent to raise that very claim before this suit was filed (HHA JS 7). Nevertheless, the only abstention doctrine HHA raised in the District Court was *Pullman* abstention; HHA never argued that *Younger* abstention, or any other abstention doctrine, was at all applicable in either its initial or supplemental briefs filed with the Ninth Circuit; and HHA did not seek rehearing or rehearing *en banc* on the ground that the panel's decision not to abstain was incorrect. Permitting HHA to raise *Younger* abstention for the first time in this Court in these circumstances would permit HHA to bushwack any private party by waiting until it loses on the merits in federal court before seeking to avoid just such a result. Because Congress never intended plaintiffs, or the federal courts, to be subjected to any such gambol, there is no reason to permit HHA to toy with Trustees or this Court in that fashion. A ruling in favor of appellants on this issue would be an open invitation to future litigants to reserve all abstention arguments until after the result has been announced in the Court of Appeals and then, if



the result is adverse, raise abstention for the first time in petitions for rehearing or in this Court.

Furthermore, here HHA not only failed to assert *Younger* but argued that *Younger* was *inapplicable* and asked the Court of Appeals to reach the merits of Appellees' federal claims.<sup>28</sup> HHA may not take a contrary position now. This Court has consistently refused to sanction such a Janus-faced approach by the government of lulling the lower federal courts into believing that a potentially dispositive threshold question was not properly before them, only to turn around and present the contrary argument for the first time to this Court. *E.g.*, *Steagald v. United States*, 451 U.S. 204, 208-211 & n.5 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). For this reason as well, appellants should not be permitted to shift positions, as if dancing a quadrille, to raise any *Younger* claim now.<sup>29</sup>

2. Second, none of the intervenors has standing to raise this claim. The *Younger* doctrine is built upon an historic concern for intergovernmental comity and the traditional reluctance of federal equity courts to enjoin pending state court judicial proceedings. *Younger*, 401 U.S. at 43-49; see *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-432 (1982). None of these parties, therefore, has any interest independent of HHA's which *Younger* protects. Accordingly, because the Court of Appeals' ruling that *Younger* is inapplicable does not affect any right of any member of this

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<sup>28</sup> See Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981), pp. 2-7.

<sup>29</sup> In fact, because HHA argued to the Court of Appeals that abstention was inappropriate on any ground (see, e.g., Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981), p. 2), HHA may not now contend that abstention is appropriate under *Burford*, *Pullman*, or *Colorado River* as well.



class of parties, none has standing to assert this claim. *H.L. v. Matheson*, 450 U.S. 398, 406 (1981); *Harris v. McRae*, 448 U.S. 297, 320 (1980); *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). Furthermore, private parties may not champion *Younger* claims over the state's desire to obtain a federal court decision on the merits. See *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. at 480. Because HHA plainly waived any *Younger* claim in this case, none of the intervenor-appellants may now raise any such claim.<sup>30</sup>

3. Third, this case does not present the issue of whether *Younger* is applicable to state court condemnation proceedings. To begin with, not only did HHA fail to raise this issue below, but the Court of Appeals found (HHA JS App. A4-A6 n.1) that there was no ongoing state judicial proceedings at the time this suit was filed.<sup>31</sup>

<sup>30</sup> Moreover, none of the intervenor-appellant organizations has standing to raise a *Younger* claim on behalf of its members. The only exception potentially applicable here to the rule that a party must assert his own legal rights and interests, and not those of another, to demonstrate standing (e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 474 (1982)), would lie only if the intervenor-appellants could satisfy the three-part test in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), for an organization to have standing to represent its members. But all of the intervenor-appellant organizations fail that test because, based upon the pleadings in this case, none can fulfill the first two parts of the *Hunt* test: namely, that (1) their individual members would have standing in their own right (for the reasons given in the text), or (2) the interests furthered by *Younger* are germane to the organization's purpose. 432 U.S. at 343.

<sup>31</sup> That factual conclusion is also a complete answer to Portlock's suggestion (Portlock JS 21-23) that the decision below conflicts with *Ahrenfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). In that case, state court condemnation proceedings were pending at the time the plaintiff filed suit in federal court. 528 F.2d at 195. HHA, by contrast, candidly acknowledges this difference between this case and *Ahrenfeld* (HHA JS 26), and has not suggested that the two decisions conflict.

That finding was plainly correct: Trustees filed this suit on February 28, 1979, and HHA did not file its first suit to condemn Trustees' property that went to judgment until November 10, 1980, over a year later. Indeed, HHA expressly acknowledged in the Court of Appeals that "no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of Trustees action \* \* \*" (Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981) p. 4). *Younger* was therefore no bar to this suit. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974).

Moreover, there were still no ongoing state judicial proceedings at the time the District Court granted a temporary restraining order and, later, a partial preliminary injunction (HHA JS App. A2-A4 n.1; *id.* A30 (Poole, J.)). By that point, "proceedings of substance on the merits ha[d] taken place in the federal court" (*Hicks v. Miranda*, 422 U.S. 332, 349 (1975)), and, therefore, *Younger* was no bar to this suit. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). HHA, again, acknowledged this fact before the Court of Appeals: "no such state proceeding ["under the disputed statute involving the Trustees and HHA"] was commenced before proceedings of substance on the merit [sic] took place in the District Court below" (Supplemental Brief for Defendants-Appellees in the Court of Appeals, pp. 4-5). Actions thereafter filed in state court do not require *Younger* abstention. *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977).<sup>32</sup>

<sup>32</sup> HHA's suggestion (HHA JS 26) that *Younger* should be extended to state administrative proceedings is inconsistent with Chapter 516, which expressly provides that administrative proceedings antedating the filing of a state court condemnation suit "shall be in advance of and shall not constitute any part of any advance of and shall not constitute any part of any action in condemnation or eminent domain" (§ 516-51(b); HHA JS A131-A132; see page 3, *supra*). HHA's claim is also inconsistent with this

4. Finally, Trustees submit that, regardless of which date is determinative for *Younger* purposes, that doctrine is inapplicable to privately-initiated condemnation suits like those authorized by Chapter 516. In this regard, we agree with HHA's conclusion that "the statute involved does not appear to be the kind of statute deemed to be 'in aid of and closely related to criminal statutes' as to justify the application of the [*Younger*] abstention doctrine to the instant civil case" (Supplemental Brief for Defendants-Appellees, p. 5). The Court of Appeals ruled that Chapter 516 simply transferred one private party's property to another, a ruling we have argued in our Motions to be plainly correct. The question of whether Chapter 516 embodies important state interests of the type *Younger* would protect is therefore at issue on the merits

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Court's decision last Term in *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Patsy* held that a party need not exhaust state administrative remedies before bringing a suit in federal court under 42 U.S.C. § 1983 (as the Trustees did in this case), and further ruled that Congress had codified this principle in the Civil Rights of Institutionalized Persons Act ("CRIP"), 42 U.S.C. § 1997 *et seq.* (Supp. V 1981). The only exception to that rule is expressly limited to Section 1983 actions brought by an adult convicted of a crime. 42 U.S.C. § 1997e(a)(1).

In that vein, whether *Younger* should be extended to state administrative proceedings must also necessarily hinge upon factors such as a party's ability to present his federal claims to that agency, the agency's authority to consider such claims and afford complete relief, the deference and respect that the state itself accords to its agency's factual findings and legal conclusions, the degree to which the particular agency is independent of the executive branch, and a host of other factors, such as those governing the appropriateness of requiring exhaustion of administrative remedies. See generally *McKart v. United States*, 395 U.S. 185, 193-195 (1969). HHA admits that "not all administrative proceedings are necessarily equivalent to judicial proceedings for *Younger* purposes" (HHA JS 26; emphasis in original). Because none of these matters was explored below, resolution of the larger issue of the extension of *Younger* to state administrative proceedings should await a case in which these matters have first been considered by the lower federal courts.

of this case. For the reasons given in our other Motions, therefore, Chapter 516 does not implicate state interests of the type *Younger* would protect.

### C. Burford.

The Court of Appeals' conclusion that *Burford* is inapplicable not only is fully consistent with this Court's decisions, and not in conflict with the decision of any other Court of Appeals, but did not even evoke comment from the dissent. Contrary to appellants' contentions, this Court has ruled that *Burford* does not require abstention simply because eminent domain proceedings are involved. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). This Court has never suggested that *Burford* requires abstention in a case like this in which (a) plaintiff has raised substantial federal constitutional claims, including claims under 42 U.S.C. § 1983, rather than simply relied upon diversity jurisdiction; (b) plaintiff's federal Constitutional claims are severable from any question of whether, under state law, the state is authorized to condemn Trustees' property, (c) resolution of that federal claim will not frustrate state policy beyond that demanded by the federal Constitution, and (d) the state has not established a specialized court to entertain all suits challenging the agency's actions. *Colorado River*, 424 U.S. at 814-815 & n.21; *Frank Mashuda*, *supra*; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951); *Burford*, *supra*.

### D. Colorado River.

Finally, Portlock alone argues, for the first time, that *Colorado River* abstention is justified for reasons of judicial administration and because a state court decision on the merits of Trustees' claims would be entitled to respect (Portlock JS 21). Portlock did not raise this claim below, however, and therefore may not raise it here. In any event, the Court of Appeals' conclusion that *Colorado*

*River* was inapposite—a conclusion to which the dissent below did not object—is plainly correct and does not conflict with any decision of this Court or any other Court of Appeals. To the contrary, the decision below is fully consistent with *Colorado River* and with two more recent decisions of this Court applying this doctrine: *Arizona v. San Carlos Apache Tribe*, 103 S. Ct. 3201 (1983), and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927 (1983).<sup>33</sup> Further review of this newly-asserted claim is therefore unwarranted.

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<sup>33</sup> Relying chiefly upon the McCarran Amendment (43 U.S.C. § 666 (1976)), a federal statute expressly approving of state court adjudication of comprehensive water rights disputes, *Colorado River* held that abstention in favor of state court adjudication of a massive (over 1,000 defendants) water rights dispute was appropriate on the facts of that case. See also *San Carlos*, *supra*. But, because “water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute” (*San Carlos*, 103 S. Ct. at 3216), the abstention doctrine articulated in that case is limited to the peculiar circumstances respecting that type of problem. See *Moses H. Cone*, *supra*. Furthermore, none of the reasons given in *Colorado River* or *San Carlos* for abstention are applicable here.

First, this Court has on three occasions ruled that by far the most important factor in determining whether *Colorado River* abstention is appropriate was the presence of the McCarran Amendment, a federal statute approving of state court adjudication as a means of avoiding piecemeal litigation. *San Carlos*, 103 S. Ct. 3215; *Moses H. Cone*, 103 S. Ct. at 937; *Colorado River*, 424 U.S. at 820. There is no comparable federal statute here. Second, here, as in *Moses H. Cone*, and unlike in *Colorado River* and *San Carlos*, federal law will provide the basis for decision. Third, abstaining now on this basis would plainly be more, rather than less, efficient as a matter of judicial administration, because far more has taken place in federal court than the mere filing of a complaint, as was the case in *Colorado River*. 424 U.S. at 820 & n.25; see *San Carlos*, 103 S. Ct. at 3206 n.3; *Moses H. Cone*, 103 S. Ct. at 936. Fourth, the federal suit plainly preceded any state court suit. See *Moses H. Cone*, 103 S. Ct. at 939-941. Appellees also brought suit in federal court as promptly as possible (pages 4-5, *supra*). Fifth, the federal suit in no way approached the massive size of the *Colorado River* suit. See 424 U.S. at 820. Finally, Portlock has not suggested that the site of the federal courthouse was in any way inconvenient for

## CONCLUSION

For the foregoing reasons and for the reasons given in our Motions to Affirm in Nos. 83-141 and 83-283, the judgment of the Court of Appeals should be affirmed. Should this Court instead note probable jurisdiction, the Court should do so only with respect to the Public Use Clause question presented by appellants, for the above reasons regarding abstention.<sup>34</sup>

Respectfully submitted,

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the parties. *San Carlos*, 103 S. Ct. at 3206 & n.3; *Moses H. Cone*, 103 S. Ct. at 939; *Colorado River*, 424 U.S. at 820. None of the reasons for abstention suggested by *Portlock* (Portlock JS 23-24) are apposite.

<sup>34</sup> Trustees, of course, would raise the other bases for affirmance identified at pages ii-iii, *supra*, should this Court decide to give plenary consideration to the case.

No. 83-236

DEC 15 1983

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of  
the Kamehameha Schools/Bishop Estate,  
*Appellees.*

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## APPELLANTS' BRIEF ON THE MERITS

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## **QUESTIONS PRESENTED**

1. Whether Hawaii's Land Reform Act, providing for the condemnation of lessor's leased fee interests in land held in concentrated ownership under long term leases, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the court below erred in failing to give the findings of the Hawaii Legislature the appropriate weight and deference due from a federal court.

3. Whether the court of appeals should have abstained from deciding the constitutional question pending resolution of contemporaneous proceedings in Hawaii courts.\*

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\*The state defendants below were the Hawaii Housing Authority ("HHA"), the Commissioners of the HHA (Paul A. Tom, Tony Taniguchi, Wilbert K. Euguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y.K. Sunn). At the time of the filing of the State's Jurisdictional Statement, Commissioners Tom, Tamura, and Chang had been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom succeeded Mr. Sunn as Executive Director. The HHA, its Commissioners, and its Executive Director are appellants before this Court.

Intervenors-defendants given leave to intervene by the district court below, and appellants before this Court, are the following lessee associations: Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Com-

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munity Association; Enchanted Hills, Unit 1; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marine Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund; and Halawa Valley Estates Fee Conversion Corporation.

Plaintiffs below, appellees before this Court, were the Trustees of the Bishop Estate ("Bishop Estate" or "Estate"): Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. Mr. Ching has since been succeeded by William A. Richardson.

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No. 83-236

**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1983

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PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

VS.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of  
the Kamehameha Schools/Bishop Estate,  
*Appellees.*

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**APPELLANTS BRIEF ON THE MERITS**

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Appellants Portlock Community Association (Maunalua Beach); Koko Head Community Lease Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc. respectfully file this Brief on the Merits to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 28, 1983. Appellants join in and concur with the arguments submitted by the Appellants in Nos. 83-141 and 83-283, with which this appeal is consolidated, and submit this brief to emphasize the points raised herein.



**OPINIONS BELOW****JURISDICTION****CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED****STATEMENT OF THE CASE**

Appellants concur with, and incorporate by reference herein, the statement of the State Appellants contained in their Brief on the Merits, No. 83-141, with respect to the description of the Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved and Statement of the Case.

**SUMMARY OF THE ARGUMENT**

The decision of the Court of Appeals for the Ninth Circuit must be vacated for the following reasons:

1. The lower court failed to recognize that a state may utilize its powers of eminent domain to achieve legitimate social ends within its police power, *Berman v. Parker*, 348 U.S. 26 (1954); and that once a state has determined that a particular exercise of that power is for a public purpose, it is not the place of the federal judiciary to act as a "super legislature" to substitute its judgment for that of a state legislature, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, at 124 (1978).

2. The lower court erred by ignoring or reappraising, without the benefit of any evidentiary hearing, the findings of the Hawaii Legislature concerning the social, economic and political effects of the peculiar housing market in Hawaii; and

3. The lower court should have required that the federal judiciary abstain from interpreting an important state statute directly involving concerns peculiar to the state where state court proceedings were pending.

### **ARGUMENT**

- I. The Decision of the Court of Appeals Ignores Settled Principles That a State May Exercise Its Power of Eminent Domain in Aid of Its Police Power and That Once a State Has Chosen to Do So a Federal Court May Not, Except Under the Most Extreme Circumstance, Interfere with That Exercise**

The court below erred in failing to recognize that the state's power of eminent domain can validly be exercised in aid of the police power; that if a particular result can be achieved under the police power, it makes no difference that the power of eminent domain is used to achieve that result. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 against a challenge that there was an unconstitutional taking because the plaintiffs' property would be taken and redeveloped for private, not public, use. The court noted that the power of Congress over the District of Columbia was the same as the legislative powers of a state. *Berman*, 348 U.S. at 31-32. Writing for a unanimous court, Justice Douglas stated:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete

definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, see *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, or the States legislating concerning local affairs. See *Olsen v. State of Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; *Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; *California State Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162; *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843.

348 U.S. at 32. The Court further stated:

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-530, 14 S.Ct. 891, 892, 38 L.Ed. 808; *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 679, 16 S.Ct. 427, 429, 40 L.Ed. 576. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area.

Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33.

The court below erred in not following the holding in *Berman*. It expressly limited the power of eminent domain to five situations, none of which included the exercise of the police power. 702 F.2d at 793-96; Appendix A, to the Appendix to the Jurisdictional Statement of the State Appellants [hereinafter cited as J.S. App.], No. 83-141, A11-A16.<sup>1</sup> Then it held that *Berman* "does not paint with so broad a brush" as to permit a legislature to implement its police powers by the exercise of the power of eminent domain. 702 F.2d at 796; Appendix A, J.S. App. No. 83-141, A17. It is impossible to reconcile the holding of the court below with the holding and language in *Berman*.<sup>2</sup>

Prior decisions of this Court make clear that in the exercise of its police power the Hawaii Legislature could have remedied the concentration of fee simple ownership of resi-

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<sup>1</sup>For convenience, reference to matters previously printed shall, where possible, be made to the Appendix of the Jurisdictional statement of the State Appellants, No. 83-141.

<sup>2</sup>Substantially all the commentators agree that *Berman* holds as described: B. Ackerman, *Private Property and the Constitution*, 190, 190 n.5 (1977); J. Gelin & D. Miller, *The Federal Law of Eminent Domain*, 15-16 (1st ed. 1982); I. Levey, *Condemnation in U.S.A.*, 214, 214 n.51 (1st ed. 1969); 1 J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 3.11[1] n.21 (rev. 3d ed. 1981); W. Stoebeuck, *Nontrespassory Takings in Eminent Domain*, 14-15, 15 n.48 31, 31 n.35 (1st ed. 1977); Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 Law & Contemp. Probs., Spring 1979, at 5, 50; Costonis, "Fair" Compensa-

dential lands in Hawaii by requiring complete divestiture of such interests.

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court upheld the exercise of the power of divestiture on behalf of a state. In *Exxon*, a Maryland statute provided among other things that producers and refiners would no longer be permitted to operate retail service stations within the state and that their ownership in such stations would, in effect, have to be divested. A Maryland trial court held that the statute violated the due process clause of the Constitution of the United States. The Court of Appeals for Maryland held the statute valid under both the due process clause and the commerce clause of the Constitution. On appeal to this Court the judgment of the Court of Appeals of Maryland was affirmed on both grounds. Of the eight participating justices, Justice Blackmun dissented on the sole ground that the Maryland statute was an impermissible discrimination against interstate commerce. Before the Supreme Court, only one of the seven oil companies (and its subsidiary) even contested the due process ruling. Justice Stephens, speaking for the court, stated:

Appellants' substantive due process argument requires little discussion. [footnote omitted] The evi-

*tion and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Colum. L. Rev. 1021, 1036-37 (1975); Lashly, *The Case of Berman v. Parker: Public Housing and Urban Redevelopment*, 41 A.B.A. J. 501-03 (1955); Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A. J. 355-59 (1966); Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 Geo. Wash. L. Rev. 730, 730-31, 734 (1955); Note, *Police Power—Slum Clearance Projects*, 40 Iowa L. Rev. 659-63 (1955); Note, *Constitutional Law—Public Use Requirement and the Power of Eminent Domain*, 53 Mich. L. Rev. 883-85 (1955); Annot., 44 A.L.R. 2d 1414, 1422, 1433 (1955).

dence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'. . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (citation omitted). Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, this argument rests simply on an evaluation of the economic wisdom of the statute, 279 Md., at 428, 370 A.2d, at 1112, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212. [footnote omitted] Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim.

437 U.S. at 124-25.

The opinion further stated:

It is worth noting that divestiture is by no means a novel method of economic regulation, and is found in both federal and state statutes. To date, the courts have had little difficulty sustaining such statutes against a substantive due process attack. See, e.g.,

*Paramount Pictures, Inc. v. Langer*, 23 F.Supp. 890 (ND 1938), dismissed as moot, 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025; see generally Comment, Gasoline Marketing Practices and "Meeting Competition" under the Robinson-Patman Act, 37 Md. L.Rev. 323, 329 n.44 (1977).

437 U.S. at 124, n.13.

This Court's holding in *Exxon* reiterated a similar holding with respect to Congress' exercise of the commerce power. In *North American Co. v. Securities and Exchange Com'n*, 327 U.S. 686 (1946), this Court held that in the exercise of the commerce power, Congress could order a public utility holding company to divest itself of its subsidiaries even though its holdings had been acquired prior to the passage of the Public Utility Holding Company Act.

Thus, the Hawaii Legislature had the power to deal with the evils of economic concentration of landownership in a way which would eliminate the evil.<sup>3</sup> Condemnation of the interests and distribution to the tenants as provided by the Legislature would atomize the concentration. In fact, it is the only conceivable way to increase the market for fee simple homes. Neither the opinion of the court below nor the concurring opinion recognizes the evils of concentration, nor does either propose another solution. To affirm the decision of the court of appeals is to hold that Hawaii cannot deal with the problem of economic concentration and that a federal court on the basis of its own knowledge can invalidate state legislation.

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<sup>3</sup>The evils found by the Hawaii Legislature are enumerated in Hawaii Rev. Stat. § 516; J.S. App., No. 83-141, at A136-A140.

In addition, extensive Findings of Fact and Conclusions of Law validating the findings of the Hawaii Legislature were recently entered in a state court proceeding under the Land Reform Act. Pursuant to the Hawaii Supreme Court's refusal to determine the



## II. The Court Below Erred in Failing to Defer to the Findings of the Hawaii Legislature

The court below erred in ignoring, in the case of Judge Alarcon's opinion,<sup>4</sup> and reappraising, in the case of Judge Poole's concurring opinion, discussed below, the extensive legislative findings made by the Hawaii state legislature in enacting the Land Reform Act. These findings included determinations that lessors, in renegotiating the initially generally affordable lease rents, adopted a practice of increasing land rentals in a manner unrelated to the value of the raw land; that these renegotiations brought about staggering increases in annual lease rents, which directly resulted in inflated land values; and that the effect of the leasehold system was found to have grave effects on the health, welfare and well being of elderly persons and to aggravate the already acute need for government sponsored low and middle income and elderly housing. J.S. App., No. 83-141, A136-A140.

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constitutionality of the Land Reform Act on motions for summary judgment in two related cases, *Hawaii Housing Authority v. Castle*, 65 Hawaii 465, 653 P.2d 781 (1982), J.S. App., No. 82-236, at A166; and *Hawaii Housing Authority v. Brown*, Civ. No. 8489 (Hawaii S. Ct., 1982), J.S. App., No. 83-236, at A163; an extensive evidentiary hearing involving the Appellees was recently held (Civ. No. 63408 [First Circuit Court, Hawaii]). As a result of a lengthy trial, the state court entered Findings of Fact and Conclusions of Law validating the legislative findings and upholding the act. A copy of the Findings of Fact is attached hereto as Exhibit 1. (See Rule 201, Federal Rules of Evidence.)

<sup>4</sup>Judge Alarcon's opinion ignores the extensive legislative findings that form the basis of the Land Reform Act by dismissing them as mere "statutory rationalizations. . . ." 702 F.2d at 798; J.S. App., No. 83-141, A21.

In choosing to ignore or reappraise on its own these extensive state legislative findings, the court below failed to accord the findings the deference required by previous decisions of this Court.

**a. The Court Below Erred in Failing to Give the State Legislative Findings the Weight and Deference Due From a Federal Court**

The opinion of the court below justified its ignoring of the Hawaii legislative findings by holding that such findings are not entitled to the same weight as those of Congress.<sup>5</sup> 702 F.2d 798; J.S. App., No. 83-141, A19. This was clearly error.

The lower court's justification contradicts this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954); there it was held that federal courts must defer to legislatively determined exercises of police power, which includes the exercise of the eminent domain power. In *Berman*, this Court analogized Congress' exercise of the eminent domain power to that by a state and held that, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 348 U.S. at 32.

Each of the cases relied upon by the court below to justify ignoring the state legislative findings was decided prior to the *Berman* decision. Since *Berman* now makes clear that the doctrinal foundation for the exercise of eminent domain is the state's police power, the standard

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<sup>5</sup>Whatever the proper weight to be given to the state legislative findings, it is clear here that Judge Alarcon's opinion gave those findings absolutely no weight whatsoever, but merely dismissed them as "statutory rationalizations."

of review of the earlier cases relied upon by the lower court is no longer authority. The proper standard is that noted in the *Berman* decision and reiterated in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978): "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "super-legislature to weight the wisdom of legislation" . . .'"

Thus, the lower court's failure to accord the proper deference to the state legislative findings was error.

**b. The Court Below Erred in Relying on "Evidence" and in Reappraising the Findings of the Hawaii State Legislature**

The pivotal concurring opinion below relied upon certain "evidence of record", 702 F.2d at 805; J.S. App., No. 83-141, A35, and looked to findings of fact in a related case in reappraising the findings of the Hawaii state legislature, 702 F.2d at 806; J.S. App., No. 83-141, A36.

First, the concurring opinion notes that, "In determining public use, the court may consider extrinsic facts and examine the statue as a whole to 'discover the dominant purpose of the taking.'" 702 F.2d at 805 (citation omitted); J.S. App., No. 80-141, A35. However, no evidentiary hearing on the public use issue was ever held since the District Court expressly declined to rely upon any evidence or facts.\* 483 F. Supp. 62, 65; J.S. App., No. 83-141, A66-A67.

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\*The trial court did note that Hawaii "has an uncommon system of landholding", and that there is a "concentration of land in a few large landholders." 483 F. Supp. 62, 67, 68; J.S. App., No. 83-141, A70-A71. However, the trial court made this observation based solely on evidence introduced at a hearing on Plaintiffs' motion for a preliminary injunction, which was not consolidated with a hearing on the merits.

Thus, assuming that the legislative findings, by themselves, were not sufficient to support a finding of public purpose, a hearing to consider the "extrinsic facts" should have been held.

The concurring opinion's error is made clear by this court's decision in *Clark v. Nash*, 198 U.S. 361 (1905). In that case, on error to the Utah Supreme Court, this Court recognized that a taking from one person to give to another might be invalid in most states but that special circumstances peculiar to a state might nevertheless justify the exercise of the condemnation power. This Court noted:

This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. *Fallbrook Irrig. District v. Bradley*, 164 U.S. 112, 159, 41 L.ed. 369, 388, 17 Sup. Ct. Rep. 56.

198 U.S. at 369.

Since no hearing was held here to determine whether circumstances peculiar to Hawaii may support the Land Reform Act, the court should not have rendered a decision on whether a sufficient public purpose existed.

Second, the concurring opinion referred to certain findings of fact in the related case of *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii 1st Cir., June 29, 1978), *vacated as moot*, Civ. No. 7294 (Hawaii Supreme Court, April 14, 1982)

J.S. App., No. 83-236, A185-A244, in reappraising the state legislative findings. 702 F.2d at 806; J.S. App., No. 83-141, A36.

Such reappraisal of the state's legislatively determined support for the exercise of police power was improper. As noted above, it is the province of the state legislature to make such determinations and, once made, the federal courts are not "to sit as a 'super legislature to weigh the wisdom of legislation.' . . .'" *Exxon Corp. v. Governor of Maryland*, *supra*, at 124. No evidentiary hearing on the public use issue was held below since the trial court gave the proper deference to the legislative findings. 483 F.Supp. 62, 65; J.S. App., No. 83-141, A66-A67. Thus, no inquiry whatsoever, much less one utilizing the appropriate minimal scrutiny required by this Court, was ever made into these legislative findings. At the very least, some kind of hearing must be held, at which the minimal scrutiny called for by this Court's decision occurs, before the lower court could reappraise the legislative findings.\*

### III. The Federal Courts Should Abstain Pending Review by the Supreme Court of Hawaii

The dissenting opinion in the court below is sufficient to show that generally federal courts should abstain in eminent domain cases such as this. There are "special circumstances" in this case, however, requiring abstention under even the most narrow application of the doctrine of absten-

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\*Cf. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), holding that even under the pre-Berman test, Congress' determination of public use "is entitled to deference until it is shown to involve an impossibility."

\*Such a hearing was recently held in state court. See n. 6, *supra*.

tion. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968) (Brennan, J., concurring).

A holding that the Hawaii Land Refom Act is constitutional on its face and that an evidentiary hearing is unnecessary does not require abstention. But in the instant case the Hawaii Supreme Court on November 10, 1982, in two companion cases set aside two trial court summary judgments upholding the constitutionality (state and federal) of the Act and remanded for trial on the issue of public use. See footnote 6, *supra*. It is academic to argue which proceedings were pending and which the Bishop Estate had settled during their progress in the state courts. There were certainly actual administrative and court proceedings extant at all times.\* See *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Wise judicial administration, conservation of judicial resources, and avoidance of duplicative litigation would suggest that the federal courts await the results of the hearing in the state court and review by the Hawaii Supreme Court to decide the constitutionality issue. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has stated that it is "strongly inclined" to follow judgments of state courts to uphold eminent domain statutes and that state legislatures and courts are more familiar with facts relating to public use. *Clark v. Nash*, 198 U.S. 361, 368 (1905).

Abstention is appropriate because of the compelling public interest of the State of Hawaii in this litigation. *Younger v. Harris*, 401 U.S. 37 (1971). The Court of Appeals for

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\*After the decision of the Court of Appeals herein, the Bishop Estate sought unsuccessfully to enjoin a pending trial on the constitutionality issue. J.S. App., 83-236, A179.

the Seventh Circuit held it was proper to abstain in a condemnation case even though the condemnee claimed that the ordinance violated the Fifth and Fourteenth Amendments to the United States Constitution. *Ahrensfield v. Stephens*, 528 F.2d 193 (7th Cir. 1975). That court stated:

This respect and concern [for state court proceedings] arises clearly in relation to a state's eminent domain system. In *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed. 2d 1058 (1959), the Supreme Court noted the "sensitive nature" of federal court intervention in a state's eminent domain system, remarking that eminent domain was "intimately involved with state prerogative." *Id.* at 28-29, 79 S.Ct. 1070. Several federal courts have opined that state eminent domain proceedings should not be interfered with by federal courts because their local nature makes interference unwise.

528 F.2d at 198.

The Court further stated:

The presence of a federal constitutional claim in the federal court action does not preclude that court's staying its hand because, as this court and others have repeatedly stated in the past, "we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it." *Cousins v. Wigoda*, 463 F.2d 603, 607 (7th Cir. 1972). See also *Harrison-Halsted Community Group v. Housing and Home Finance Agency*, *supra*, at 106; *Georgia v. City of Chattanooga*, *supra*, 264 U.S. at 483-84, 44 S.Ct. 369; *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 518, 75 S.Ct. 452, 99 L.Ed. 600 (1955).

528 F.2d at 198.



The court below pointed out the conflict between the Ninth Circuit and the Seventh Circuit as to whether *Younger* abstention should apply in eminent domain and land use cases and that this Court has not addressed the issue. *Midkiff*, 702 F.2d at 801-02 (Poole, J., concurring).<sup>10</sup> J.S. App., No. 83-141, A27-A28. Inasmuch as due process issues arise in almost every condemnation and land use case, abstention should be the general rule in these cases. See Ryckman Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 Calif. L. Rev. 377, 425 (1981); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859, 870 (1976).

Because the Hawaii Supreme Court had held that there must be a hearing on both federal and state constitutional issues, and because such a hearing was in progress at the time of the decision of the court below, this case is strikingly similar to *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). There, the district court upheld what would otherwise have been an illegal trespass on the ground that the defendant, Kaiser Steel, had rights of eminent domain under a New Mexico statute. The court of appeals reversed, holding that the statute had no public purpose as required under the New Mexico Constitution, and refused to abstain. *W. S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd*, 391 U.S. 593 (1968).

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<sup>10</sup>A related, but different question is whether federal courts should abstain in eminent domain actions founded on diversity of citizenship. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

Kaiser's claim for abstention was raised for the first time on rehearing based on a state court action it had filed after the opinion of the court of appeals. This Court held that the court of appeals erred in refusing to abstain because of the pending state court proceedings which would resolve the issue, ordering the district court to retain jurisdiction pending expeditious resolution of the state proceedings.

Just as there was no waiver of the abstention issue in the *Kaiser Steel* case where it was raised after the initial decision of the court of appeals, so there is no waiver here.

The concurring opinion pointed out that the issue was one of vital concern to the state of New Mexico so that there were "special circumstances" justifying abstention.

Thus, here the "special circumstances" for abstention are:

1. The compelling economic and social interests of the State of Hawaii;
2. The existing state trial on the constitutional issue;
3. The error of the court below in reappraising legislative findings; and
4. The need for findings by a state court on public use.

## CONCLUSION

The Hawaii Land Reform Act may well be the most important piece of legislation enacted by the State of Hawaii. This importance and the failure of the court below to follow the decisions of this Court requires that this Court vacate the judgment of the Court of Appeals for the Ninth Circuit entered on March 28, 1983, with instructions that it reinstate the decision of the District Court for the District of Hawaii dated December 19, 1979. Alternatively, the court of appeals should be instructed to vacate the decision of the district court and require the district court to abstain from further proceedings pending the completion of litigation in the state courts.

Respectfully submitted,

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*and Hahaione Valley*  
*Community Association,*  
*Inc., Intervenor-*  
*Appellants*

**Exhibit 1**

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In the Circuit Court of the First Circuit  
of the  
State of Hawaii

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Civil No. 63408 (Kamiloiki Valley)

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Hawaii Housing Authority,  
a public body and a body corporate and politic,  
Plaintiff,

vs.

Frank E. Midkiff, et al.,  
Defendants.

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[Filed Sept. 6, 1983]

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**Findings of Fact and Conclusions of Law**

Plaintiff is the Hawaii Housing Authority ("HHA") of the State of Hawaii who has filed a complaint in eminent domain to condemn 257<sup>1</sup> houselots in the Kamiloiki Tract in the area known as Hawaii Kai in the City and County of Honolulu, State of Hawaii pursuant to its authority under HRS Chapter 516.

Named as Defendants in the Complaint are the trustees to the Kamehamea Schools/Bishop Estate, who, at the Complaint's filing, were Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson ("Defendant Trustees").

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<sup>1</sup>The original number of houselots condemned at the time of the filing of the Complaint was 257. Since that time a number of lessees have withdrawn reducing the number of houselots to approximately 253.

Also named as defendants are the individual lessees of the 257 houselots being condemned ("Defendant Lessees").

Defendant Trustees are owners of the fee title to 257 houselots being condemned. Defendant Lessees have signed leases with Defendant Trustees to lease the houselots for a term of 55 years and are owners of the improvements on the houselots. Defendant Lessees have petitioned the HHA to purchase leased fee interest of their respective houselots under Chapter 516. Pursuant to that petition, the HHA designated for condemnation under Chapter 516 the 257 houselots on October 17, 1980. On November 10, 1980, the HHA filed its complaint in eminent domain to condemn the leased fee interest to these 257 houselots.

From March 14, 1983 through June 6, 1983, this case was tried before this Court on the issue of whether this condemnation was for a public use.

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**Issues:**

The basic issue in this case is whether this condemnation is for a public use and purpose and, therefore, constitutional under the United States and Hawaii State Constitutions. Included in this overall issue are two sub-issues:

(1) Is Chapter 516, Hawaii Revised Statutes, constitutional, i.e., are condemnations under H.R.S. Chapter 516 for a public use and purpose and, therefore, constitutional; and

(2) Is this particular condemnation in this case done to effectuate the public purposes of H.R.S. Chapter 516 and, therefore, for a public use and purpose.

**Findings of Fact**

**I. The Current Factual Context**

**A. Chapter 516, Hawaii Revised Statutes: An Overview**

1. Chapter 516, Hawaii Revised Statutes (hereinafter "Chapter 516"), was enacted as Act 307, 1967 Haw. Sess. Laws. It was amended by Act 46, 1968 Haw. Sess. Laws; Act 215, 1971 Haw. Sess. Laws; Act 2, 1972 Haw. Sess. Laws; Acts 184 and 186, 1975 Haw. Sess. Laws; Act 242, 1976 Haw. Sess. Laws; Act 140, 1978 Haw. Sess. Laws; Act 227, 1979 Haw. Sess. Laws; Acts 39 and 107, 1980 Haw. Sess. Laws; and Acts 203, 204 and 270, 1983 Haw. Sess. Laws.

2. The several parts of Chapter 516 were labeled by the legislature as follows:

Part I. General Provisions

Part II. Condemnation of Development Tract

**Part IIA. Mandatory Arbitration of Compensation**

**Part III. Rights of Lessees**

**Part IV. Judicial Declaration**

3. In this trial, the Court's principal concern has been with the Constitutionality of the provisions of Part II, concerning condemnation, and the legislative findings and declarations of necessity and purpose of the statute contained in Section 516-83 (enacted by § 2, Act 186, 1975 Haw. Sess. Laws) in § 1 of Act 307, 1967 Haw. Sess. Laws and in § 1 of Act 184, 1975 Haw. Sess. Laws.

4. Through Part II, the Hawaii Housing Authority (hereinafter "HHA"), after having determined that certain requirements have been met, may designate all or a portion of a development tract for acquisition and acquire the leased fee interests in the residentialouselots in each development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain.

**B. Chapter 516, Hawaii Revised Statutes: Legislative Findings**

5. The Legislature's justification for Chapter 516 can be found in the legislative findings expressed in Act 307, Session Laws of 1967; in Act 184, Session Laws of 1975; and in Act 186, Session Laws of 1975 (HRS § 516-83).

**Act 307 1967:**

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of

residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are all equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property ..."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the day of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are

currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private lease residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's

urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Act 184, 1975:

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State of Hawaii is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leaseholds. In 1973,

leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;



(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run;

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing on; and

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly

in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

Act 186, 1975 (HRS § 516-83):

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling lands has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the state;

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple

will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high basic cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living;

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living comparable with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large popula-

tion of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values;

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few;

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous eco-

conomic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy;

(10) The State's acquisition of residential lands in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii;

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly indi-

vious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter;

(12) The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the



right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

C. Chapter 519, Hawaii Revised Statutes: An Overview

6. Chapter 519, Hawaii Revised Statutes enacted as Act 185, 1975 Session Laws (hereinafter "Chapter 519") provides that renegotiated rent be calculated upon the use to which the land is restricted by the lease and, in the case of single family residential leaseholds, provides that rent be renegotiated not more than once every 15 years. It also provides a ceiling on the amount of rent that can be charged which limits the lessor's return to 4 percent on his "owner's basis." Chapter 519 is relevant both to matters addressed in the justifications for Chapter 516 declared by the legislature and to calculation of the compensation to be paid for the lessor's leased fee interest upon condemnation. The constitutionality of Chapter 519 is not challenged in this action.

D. Chapter 519, Hawaii Revised Statutes: Legislative Findings

7. The Legislature expressed the justification for Chapter 519, in Act 185, 1975 in the following findings:

The home is the basic source of shelter and security in society, the center of our society which provides the

basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Although with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it has during the period of 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed

on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership 'is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical'.

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the

direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in the ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold,

although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial \$68,000 (before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare, and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of con-



fiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated, above, the public health, safety and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

#### E. The Parties

8. Plaintiff, the Hawaii Housing Authority, is a public body corporate and politic with perpetual existence organized and existing under the laws of the State of Hawaii.

9. Defendant Lessees are lessees of residential lots owned by Defendant Trustees and located in the development tract known as Kamiloiki in the area known as Hawaii Kai in the City and County of Honolulu, State of Hawaii. The interests of the Defendant Lessees are adverse to those of the Defendant Trustees.

10. Defendants Kaiser Hawaii-Kai Development Co., Kaiser Aetna, and Kacor Realty, Inc. are the subdividers and developers of the subject property, and have an interest in the lease rents obtained therefrom, but did not participate in either the valuation or public use segments of this trial.

11. Defendant Trustees are all residents of the City and County of Honolulu, State of Hawaii, and are the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, a trust estate created for charitable and educational purposes.



#### F. Activity Under Chapter 516

12. At least twenty-five separate condemnation actions have been filed against Defendant Trustees under Chapter 516. This is the first of those actions to go to trial. In a jury trial last year, presided over by Judge Arthur Fong, the compensation to be paid Defendant Trustees for their leased fee interest in the 257 lots was determined by jury verdict.

13. Condemnation actions have also been filed and are pending against other lessors. Summary judgments against two of them on the constitutionality of Part II of Chapter 516 were reversed by the Hawaii Supreme Court. *Hawaii Housing Authority v. Castle*, 65 Haw. Adv. No. 8468, 653 P.2d 871 (November 10, 1982) and *Hawaii Housing Authority v. Brown* (unpublished memorandum opinion filed on November 10, 1982, Sup. Ct. No. 8489) on the grounds that the evidentiary record was lacking.

14. As a result of the Hawaii Supreme Court rulings just mentioned, Defendant Lessees withdrew their Motion for Partial Summary Judgment That This Condemnation Fulfills A Public Purpose and this evidentiary trial on the public use issue ensued.

#### II. Legislative History

15. The legislative history of the Land Reform Act demonstrates that the Hawaii State Legislature was deeply concerned with the concentration of land ownership and perceived the residential leasehold practice to be detrimental to land use, housing and other aspects of the states' economy and public concern. The Legislature's extensive investigation and research demonstrates that the Legislature did not act hastily, unreasonably or to serve any spe-

cial or selfish interest when it enacted and amended the Land Reform Act.

16. From 1955 through 1975, the legislature drafted and passed successive pieces of legislation to investigate, determine possible solutions and to rectify these problems concerning residential leasehold land tenure, the concentration of landownership, the resulting inflation in land prices, the desire for people to own their houses in fee simple, and the effect on the public's health and welfare. These legislative actions culminated in HRS Chapter 516 as amended.

17. On April 23, 1955, the Territorial Senate passed Senate Resolution No. 49 requesting the estates and corporations in the Territory holding land for investment or speculative purposes to submit to the Legislative Reference Bureau written statements giving in detail their plans to comply with the sense of that resolution. That resolution states in part:

WHEREAS, the limited land area of the Territory makes it essential not only that all of our land be put to its highest and best use but that the ownership of such land be diversified to the greatest possible extent; and

WHEREAS, the ten largest land holders own about 30% of the total area and about 50% of the total privately owned land in the Territory; and

WHEREAS, this concentration of land ownership in the hands of large trusts and corporations, holding such lands in perpetuity for investment and speculative pur-

poses, not only violates the principles of prudent investment but is deleterious to the economic and social welfare of the Territory; and

WHEREAS, the Senate of the 28th Legislature is not satisfied with the various emotional arguments made and inadequate excuses given for the failure of certain large land holding interests to diversify their investments and markedly increase the amount of fee-simple land on the market; and

WHEREAS, the Senate of the 28th Legislature is aware that the rapidly waning days of the session will not allow the enactment of carefully considered legislation aimed at forcing proper dissolution of certain inordinately large land holdings; and

WHEREAS, such drastic action may become unavoidable in the near future if the various land holding trusts and corporations do not, of their own accord, take immediate steps to diversify their holdings and release to the people of the Territory substantial areas of fee simple land; now, therefore, . . .

(Exh. 61)

18. In 1959, the Territorial Senate drafted Senate Bill No. 7, "An Act Creating The Hawaii Land Development Authority, Providing For The Purchase Or Condemnation Of Certain Private Lands For Resale Or Lease To Private Parties Or To The Various Counties Or The Territorial Government For The Development Of Residential, Com-

mercial, Or Agricultural Uses, And Making An Appropriation Thereof." (Exh. 62) The following legislative committee reports were drafted concerning Senate Bill No. 7: Senate Standing Committee Report No. 312, dated April 16, 1959; Senate Standing Committee Report No. 512, dated April 23, 1959; House Select Committee Report No. 1, dated May 2, 1959; Select Committee Report No. 1, Supplement, dated May 2, 1959; Senate Conference Committee Report No. 1, Supplement, dated May 2, 1959; Senate Conference Committee Report No. 15, dated May 2, 1959. (Exh. 62)

Senate Standing Committee Report No. 312 states in part:

"1. The purposes of Senate Bill No. 7 is to create the Hawaii Land Development Authority, a public corporation, which will have the power to designate certain areas as development areas for the purpose of making available needed lands for residential, commercial or agricultural uses. The bill provides for the disposition of land so acquired and developed to persons who meet the requirements of the bill. The bill further provides that a private developer may make funds available to the authority for the purchase of a designated area and develop said area according to plans and specifications formulated in advance by the authority. The bill further provides that all persons owning land areas exceeding 5,000 acres shall annually file, under oath, a declaration of value, together with a stated offer to sell to the authority at any time during the 12-month period the parcels owned at the valuation stated plus 25%. The bill further provides that the authority shall issue revenue bonds to finance its projects.

Your Committee has held hearings on the bill and finds that there exists a need for the availability of lands contemplated by the bill; that owners of large tracts of land are unable or unwilling to develop their lands adequately, thereby creating an artificial scarcity of lands resulting in an artificial inflation of prices. This artificial inflation of prices makes it impossible for persons of moderate circumstances to purchase or own homes or lands at reasonable prices or at any price in sufficient numbers to provide for the constantly growing population of the Territory, especially on Oahu.

Your Committee finds that this condition is gravely detrimental to the public health and welfare. Your committee finds that the acquisition and development of land areas by the government, so as to meet the present need, will establish a well-balanced community in which our limited land areas will be put to their highest and best use.

Your Committee is in accord with the purpose of Senate Bill 7 and recommends that it pass second reading and that it then be referred back to the Committee on Lands for further consideration."

(Exh. 62)

House Select Committee Report No. 1 states in part:

"2. The problem of fee simple vs. leasehold: Much has been said on the relative merits and demerits of fee simple and leasehold land for home sites.

We believe that Oahu does present a special situation in this regard because of the intrinsically high cost of land. However, we feel that a free citizen in a country

such as ours should have the opportunity to own his own home and the land on which it stands. Home ownership in fee gives the owner a sense of permanence and status. Further, land on Oahu is recognized as one of the best investments. This is true not only because of the inevitable accrual of value as the community develops but also because land in Hawaii is an effective hedge against inflation. The Bishop Estate has pointed with pride to the fact that its assets have increased tenfold in value since the end of World War II, from about \$6,000,000 assessed valuation to about \$60,000,000. We feel that the average citizen should have the right to enjoy for himself and his heirs a similar accrual of value.

At the present time, the average citizen has very little choice between fee and leasehold land. This lack of choice for the person of moderate means is the result of many factors including (a) the high cost of land, which forces buyers into the leasehold market; (b) the rising cost of construction and the shortage of available mortgage money which dictates that nearly all of a buyer's available capital must be put into the house, again forcing him into the leasehold market, (c) the taxes on the seller of land imposed by the Federal government which can, in some instances, make voluntary sale of the fee impractical; and (d) the natural desire on the part of the large landholders to retain the fee and thus the unearned increment arising from the ever increasing value of the land. As a result of these pressures, Bishop Estate, which according to their own testimony, use to maintain a relationship of four leasehold lots to three fee simple, will, in the next few years, put on the market about thirty lease lots to one fee simple.

This means that the average citizen will not longer have a choice; he will have to take a lease if he wants a house. S. B. No. 7, S. D. 4, H. D. 1 is aimed at providing this choice. The land can be developed for sale in fee or, in cases where the costs are high, for lease with option to purchase. Provision has also been made to provide leasehold lots where conditions dictate."

(Exh. 61)

19. In 1959, the Territorial House of Representatives drafted House Bill No. 7 which was its version of Senate Bill No. 7. (Exh. 63)

20. On March 2, 1959, the first meeting of the Public Lands and Land Reform Committee of the Senate was held. At that meeting the following objectives were approved as they related to Land Reform:

"A. To determine the effect of continued control of private lands by large landowners on:

1. Shortage of fee simple lands for:

- a. Houselots
- b. Industrial lots
- c. Diversified agriculture

2. Economic expansion of Hawaii

3. Leasehold system

B. To determine ways and means, if found necessary to:

1. Utilize idle lands to the best advantage of our economy by:

- a. Taxation



- b. Incentives
- c. Condemnation
- d. Other proposals which may be submitted by members or land holders

C. To determine ways and means to accelerate the use of Territorial lands for the purpose of providing lands for industrial, agricultural and houseslots."

(Exh. 65)

The following were findings of the pre-legislative hearings on land matters as conducted by the House Committee on Judiciary and Land Reform as was presented to the March 2, 1959 meeting of the Senate Committee on Public Lands and Land Reform:

"1. Government (Federal, Territorial and County) owns 42% of the land in the Territory; 60 landholders of 5,000 acres or more own 46%; and 60,000 holders, 11%.

2. The cost of homes and lots is considerably higher in Hawaii than on the mainland. The Comparative prices were given as follows:

	<u>Hawaii</u>	<u>USA</u>
House .....	\$15,400	\$12,100
Lot .....	4,200	1,600

The higher cost of land, materials and offsite improvements in Hawaii was given as the reason for the wide gap in the price structure. Representative Gill further pointed out the difference in construction of house: single-wall vs. double-wall brick construction on the mainland.

3. Thirty percent of the homes in Hawaii are owner-occupied; on the mainland the owner-occupancy is 60%.

4. Thirty-five percent of the wage-earners fall in the \$3,500 to \$6,000 income class. Those earning below \$3,500 are eligible for public housing; those earning \$6,000 and over can afford private housing under existing market prices; but, the individuals in between the two classes are ineligible for public housing and unable to afford private housing now available on the market.

5. Private and eleemosynary trusts are faced with the following problems:

- a. Fear to sell because of restrictions under trust indentures or because of tax reasons.
- b. Shortage of finances.
- c. Inability to borrow finance improvements.
- d. High cost of developments.

6. The key to the situation is "condemnation or the threat of condemnation". Under condemnation or threat of condemnation, the trustees of the estates will:

- a. Be able to justify their actions under the trust instrument.
- b. Get land on the market.
- c. Get the tax benefit.
- d. Get sufficient funds from the sale of the land for the development of other lands or for higher-income producing investments."

(Exh. 65)

21. During committee hearings on Senate Bill No. 7 and House Bill No. 7, Trustees from the Bishop Estate and the Estate of James Campbell presented testimony. (Exh. 66)

22. On March 12, 1959, the Senate Committee on Public Lands and Land Reform sent letters to the following landholders requesting their appearance before the Committee to give information on land holdings, development plans and to state their respective positions on Senate Bill No. 7: Bishop Estate, Queen's Hospital, Liliokalani Trust Estate, Sherwood Greenwell, James W. Campbell Estate, Molokai Ranch Co., L.C. McCandless Estate, H.K.L. Castle Estate. All except Queen's Hospital responded to the Committee's request. (Exh. 66, 69)

23. In connection with Senate Bill No. 7 and House Bill No. 7, the legislature received comments from, *inter alia*, the Chamber of Commerce of Honolulu; Hawaiian Sugar Planters Association, Hawaiian Civic Club, Kaloaloe Neighborhood Association. (Exh. 72)

24. On January 2, 1959, the House Committee on Judiciary and Land Reform had sent supplemental questions on landholdings and development practices to representatives of large landholders. (Exh. 75) Some of the landholders responding to the questionnaire on land holdings and practices were the Bishop Estate (Exh. 76); the Campbell Estate (Exh. 77); the Heirs of Mary E. Foster (Exh. 78); the Damon Estate (Exh. 79); W. M. Greenwell, Ltd., (Exh. 80); Castle & Cook (Exh. 81); Hawaiian Commercial & Sugar Co., Ltd., (Exh. 82); Hawaiian Dredging & Construction Co., Ltd. (Exh. 83); Hawaiian Pineapple Co., Ltd., (Exh. 84); Mr. H. K. L. Castle and Kaneohe Ranch (Exh. 85); the Liliuokalani Trust (by Cooke Trust) (Exh. 87); the L. C. McCandless Estate (Exh. 88); the Queen's Hospital (Exh. 89); the Molokai Ranch (Exh. 90).

25. Additionally, the Legislature received testimony on House Bill 7 from the Honolulu Board of Realtors; the Chamber of Commerce of Honolulu; Dudley C. Lewis, the Trustee of Estate of S. M. Damon; Aaron M. Chaney, of the Cooke Trust Co.; the Estate of James Campbell; the Territorial Council of Hawaiian Civil Clubs; Frank E. Midkiff, Trustee of the B. P. Bishop Estate; and the L. C. McCandless Estate. (Exh. 92)

26. In 1959, the Territorial Legislature passed, and the Territorial Governor signed into law, Senate Bill No. 7, "An Act Creating The Hawaii Land Development Authority, Providing For the Purchase or Condemnation of Private Property on the Island of Oahu For Resale, lease or lease With Option To Purchase To Private Parties For The Development Of Residential Uses And Other Facilities In Connection Therewith, And Making An Appropriation." This bill became Act 279. Section 1 of Act 279 states:

**SECTION 1. *Findings and declaration of necessity.***

The Legislature hereby finds and declares that: (a) there exists a critical shortage of residential fee simple property on the Island of Oahu; (b) this shortage has created an artificial scarcity and resulting high prices making it extremely difficult or impossible for persons of moderate means to own their own homes; (c) a large and expanding population in a growing economy will further aggravate the already existing shortages; (d) a prime goal of land policy in the United States has been to promote the public welfare through the greatest possible attainment of individual home ownership; (e) the high percentage of private land held by relatively few owners

on an island of very restricted area coupled with the inability or unwillingness of some of these large owners, because of trust indentures or strong contributing factor in creating this critical shortage and the accompanying artificial price inflation; (f) available and suitable public lands on Oahu are insufficient to adequately relieve the existing shortage of residential lands either in fee or in lease; (g) where the goal of home ownership is not immediately attainable for people of moderate means, leasing or leasing with an option to purchase house lots can provide an interim method of meeting a portion of the housing need; (h) it is therefore necessary that the government acquire through its power of eminent domain and sufficient lands to develop to meet the present need and establish a well-balanced community where fee ownership is a right, and in which limited land areas may be put to their highest and best use; and (i) it is hereby declared as a matter of legislative determination that acquisition and development of land hereunder is declared to be a public use and purpose.

(Exh. 95)

27. On June 25, 1959, Senate Bill No. 10, was enacted as Act 269, "An Act Authorizing The Subdivision, Improvement And Leasing Of Public Lands For Residential Purposes To Qualified Persons Selected By Drawing Without Public Auction; Creating The Residential Lease Advisory Commission And Providing For Its Powers, Duties And Functions; And Amending Inconsistent Laws." Section 1 of Act 269 states:

Findings and declaration of necessity.

It is hereby found and declared that:

(a) There is a shortage in the Territory of land suitable for residential use and available to persons whose incomes and circumstances are such that they do not qualify for or do not require publicly provided low-rent housing accommodations and who are able to secure financing for the construction of their own homes, but who are unable through lack of sufficient financial ability to purchase land in fee simple or to pay the premiums for and rentals under leaseholds offered for sale by private landowners.

(b) This group includes persons whose residential property has been taken for public purposes and who, while they have received the full and fair value of their property, by purchase or condemnation, are unable to replace the property taken with the proceeds paid or other available funds because of the shortage of similar property in the community.

(c) This situation has prevented many citizens of the Territory from improving their standards of living in accordance with their means and has forced many into residential property purchase or lease contracts beyond their means.

(d) This situation has also forced many citizens of the Territory into private or publicly provided low-rent housing facilities with the result that the purposes for which public low-rent housing facilities are provided have been injuriously affected and with the further result that both urban development and urban renewal projects have been not only impeded but also become more urgently required.

(e) Experience has demonstrated that when public lands are subdivided and sold in fee simple at public



auCTION, for residential use, the demand for residence property has forced the price of such lands beyond the financial reach of the persons previously mentioned, and that neither the program of opening public lands for sale in fee simple as residence lots, nor the programs for providing low-rent public housing, for urban redevelopment or for urban renewal are adequate or designed to provide the opportunity for such persons to provide themselves with the decent, safe, sanitary and uncongested residence accommodations consistent with their financial ability and necessary to provide the environment conducive to promoting their own and their children's good citizenship.

(f) The alleviate this shortage of land suitable for residential use, to promote the accomplishment of the purposes of the programs for public low-rent housing, urban redevelopment and urban renewal, including the elimination of slum and other conditions detrimental to the public health, safety and welfare, it is necessary that public lands be made available on terms within the financial means of those citizens who, because of the shortage before mentioned, are unable to purchase public or private lands in fee simple or to lease private lands for use for residential purposes. Making public lands available for such purposes, pursuant to the provisions of this act, is hereby declared to be a public purpose.

(Exh. 94)

28. In the 1961 session, the legislature drafted House Bill No. 7, "An Act Creating The Hawaii Land Development Authority, Providing For the Purchase or Condemnation of Certain Private Lands For Development For



Residential Uses and Resale To Or Lease With Option To Purchase By Private Parties, And Making An Appropriation Therefore." Section 1 of House Bill No. 7 states:

SECTION 1. *Declaration of findings and need.* The legislature hereby finds and declares that there is a shortage on the Island of Oahu of lands suitable for residential use and available for purchase by persons in moderate circumstances; that this situation tends to artificially inflate the prices for which available residential lands may be acquired and to aggravate the shortage of suitable housing accommodations for the population of the Island of Oahu; and that the acquisition and development of land areas by the government is necessary in order to meet the present need.

(Exh. 100)

29. In the 1961 session, the legislature drafted House Bill No. 166, "A Bill For An Act Amending, And As So Amended, Re-enacting, Ratifying, and Confirming Act 269 of the Thirtieth Legislature, Territory of Hawaii, Regular Session 1959."

(Exh. 105)

30. House Bill No. 166 was made necessary because Act 269 was enacted in 1959 while Hawaii was a territory and had to be re-enacted after statehood.

(Exh. 102)

31. In the 1961 session, the Legislature drafted House Bill No. 16, "A Bill for an Act Providing For the Purchase of the Fee Simple Title By Lessees And Sublessees Of Certain Residential Houselots and Providing Procedures

For the Conveyance of Such Titles By Trustees, Life Tenants, Holders of Refeasible Estates, Infants and Incompetents." Section 1 of House Bill No. 16 states:

*Policy.* It is hereby declared that long term leases of residential houselots in the state are contrary to public policy because they are inimical to the establishment of stable, permanent residential communities and are injurious to the social and economic well-being of its citizens. It is hereby declared that fee simple ownership of residential lots is the public policy of the state and that all long term leases shall, by law, as hereinafter provided, be subject to an option on the part of the lessee of sublessee to purchase the fee.

(Exh. 104)

32. House Standing Committee Report No. 80 on House Bill No. 16 states in part:

Your Committee held two hearings on this bill wherein the previous objections recorded in past session of the legislature were again reiterated by Mr. J. Garner Anthony, representing the Bishop Estate; Mr. Baird Kidwell, representing the trust companies; and Mr. Wade McVay, representing the Campbell Estate.

Your Committee is of the opinion that this piece of legislation is long overdue. It believes that the numerous other ways which the legislature has sought to alleviate the housing shortage and to encourage the fee simple ownership of homes have been to no avail. Therefore it believes that it is imperative that the legislature specifically declare that fee simple ownership of homes is the public policy of our state. It also believes that the right

to redeem long term leases is necessary to effectuate this public policy.

(Exh. 103)

33. During the 1961 session, the legislature drafted Senate Bill No. 378 entitled, "An Act Providing For the Purchase Or Condemnation Of Private Property On the Island Of Oahu For Resale, Lease Or Lease With Option To Purchase To Private Parties For the Development Of Residential Use and Other Facilities In Connection Therewith, And Making An Appropriation." The purpose of this bill was to re-enact Act 279, Session Laws of Hawaii 1959.

(Exh. 106)

34. On May 4, 1961, Governor William Quinn signed into law Senate Bill 378 designated as Act 6 of the Session Laws of Hawaii 1961 and entitled, "An Act Providing for the Development of Lands For Residential Uses and Other Related Facilities And For the Purchase or Condemnation of Private Property In Connection Therewith on the Island of Oahu; And Providing For the Financing Thereof." The legislative findings and declarations of Act 6 remained unchanged from those stated in Findings of Fact No. 26 referring to Act 279.

(Exh. 107)

35. In the 1963 session, the Legislature drafted House Bill No. 409, "A Bill For An Act "Providing for the Right of Purchase Of Fee Simple Title By Lessees Of Residential Real Property And For Procedures For Conveyance Of Title By Lessors And Parties Whose Interests Are Affected." Section 1 of House Bill No. 409 states:

*Policy.* It is hereby declared that fee simple ownership of residential real property is the public policy of

the state and that all long term residential leases shall be subject to an option to purchase the fee on the part of the lessee as hereinafter provided.

(Exh. 108)

'36. During the 1963 session, the Legislature drafted House Bill No. 24, "A Bill For An Act Relating To The Redemption Of Leases And Sub-leases Of Residential Real Property; Providing Procedures For Conveyance Of Title By Trustees, Life Tenants, Holder Of Defeasible Estates, And Infants."

The House Standing Committee Report No. 33 on House Bill No. 24 states in part:

The purpose of this Act is to provide that all leases of residential real property, if for a term of fifteen years or more, may be ended at the option of the lessee or tenant who has used the residential real property as his personal residence for at least five years upon the payment to the owner of the capitalized value of the rent under or reserved by the lease after the expiration of five years from the date of such lease or sub-lease, and upon such payment to have the fee simple title to the property vest in the lessee or tenant.

Section 1 of House Bill No. 24 states:

*Findings and declaration of necessity.* The legislature finds that: (1) a limited number of landowners own more than three-quarters of the privately-held land in the State; (2) much of this land is in rapidly developing urban areas; (3) such a concentration of ownership of private land results in a practical land monopoly, and causes upward pressures on land prices; (4) such pressures are made more intensive by the development prac-

tices of these large landowners or making land available in rapidly developing areas only as leaseholds and not in fee simple; (5) the ability of a large number of people to acquire fee simple ownership of residential lots at a fair and reasonable price is an important factor which vitally affects the development of the community; (6) the number of residential leaseholds and the proportion these leaseholds constitute of the total number of residential lots have increased at a very rapid rate during the past fifteen years so that today approximately fifteen per cent of all owner-occupied units in the State are on lease lands and approximately twenty per cent on the most urbanized on the islands; and by 1980 it is likely that more homes will be located on leased than fee simple land; (7) it is also likely that more than eighty per cent of the new residential lots which will become available for owner-occupancy between now and 1980, especially in the most urbanized areas will be leaseholds unless significant changes are effected; (8) such a limited availability of fee simple land for residential purposes effectively deprived the people of Hawaii who desire to purchase new or relatively new residences of the right to choose whether they wish to own the land or lease the land on which their homes are situated and makes such people live dependently upon the land of others.

It is hereby declared as a matter of legislative determination that the scarcity of fee simply houselots within the State of Hawaii and, in particular, in the urban areas, is a matter affected with the public interest and that measures to provide for the right of individuals to purchase the fee simple title to houselots are necessary in furtherance of the general welfare.

37. Testifying on House Bill No. 24 were the Christian Social Action Sub-Committee on land; the Central Labor Council of Honolulu, AFL-CIO; three trustees of the Bishop Estate; the Builders Association of Hawaii; the Kaneohe Ranch Company; H. B. Kidwell on behalf of Harold K. L. Castle; and the Council of Hawaiian Organizations; the Estate of James Campbell; the Honolulu Board of Realtors; and the Home Builders Association of Hawaii. (Exh. 110, 111) This bill was commonly called the Maryland Land Law and was narrowly defeated in 1963.

38. During the 1965 session, the Senate passed Senate Resolution No. 128 calling for the Legislative Reference Bureau to up-date its 1961 study of large private land-owners and land use in the state.

(Exh. 112)

39. During the 1967 session, the Legislature drafted Senate Bill No. 1128 entitled, "A Bill For An Act Relating To Residential Leaseholds, The Acquisition By The State through Condemnation of Lands in Fee Simple And The Disposition Thereof, And The Rights of Lessee," which was enacted in that session as Act 307, the Land Reform Act. Act 307 provided that the effective date of the act's authority to obtain fee simple title would not be until July 1, 1969. The purpose of this delay was to allow the Legislature to receive additional input from the community on the Act. (Exh. 118)

40. Between the enactment of Senate Bill No. 1128 and the effective date of Act 307 and beyond, the Legislature sought and received information and written testimony from landowners and community organizations including the Bishop Estate, the Council of Hawaiian Organizations;



the Honolulu Board of Realtors; the Legislative Reference Bureau; the Savings and Loan League of Hawaii; the Estate of James Campbell; the Bank of Hawaii; the Dillingham Corporation; the Mortgage Bankers Association of Hawaii; the Kaiser Hawaii-Kai Development Company; the Kaneohe Ranch; Lewers and Cooke; the Pearl Harbor Heights Developers; the Veterans Administration; Thomas McCormack; the Liliuokalani Trust; The Windward Oahu Chamber of Commerce; the Chamber of Commerce of Hawaii; and Chaminade College (Exh. 115, 116, 117).

41. Legislative hearings were scheduled by the Interim Committee on Lands, House of Representatives on Act 307 on November 16, 1967 for bankers, savings and loan institutions, mortgage companies and federal agencies; November 17, 1967 for land developers; and November 19, 1967 for land owners and the realty board. (Exh. 115) Further hearings were held on April 25, 1967. (Exh. 116)

42. The House Special Committee Report No. 2, dated April 10, 1967, reported that that committee along with representatives from the Bishop Estate, the Campbell Estate and the Kaneohe Ranch Co. met on April 6, 1967 with officials from the Internal Revenue Service to discuss the possible adverse income tax consequences to lessor-landowners upon the sale of fee simple title to the lessees under various bills before the Legislature. At the conference, two general approaches were discussed: (1) statutory options under which lessees could purchase the fee simple interests of lessors; and (2) condemnation of residential houselots by a government agency for subsequent re-sale to the lessees residing thereon. The tax ramifications of both approaches were examined thoroughly. The committee report concluded



that adverse tax consequences to the lessor-landowner could be avoided, according the Internal Revenue Service, if the relevant statute called for condemnation in bulk, i.e., condemnation of an entire tract through which the State may become the lessor of those lots, which after condemnation, the lessees choose not to buy. (Exh. 127)

43. To accommodate the large landowners who did not want to be taxed as dealers in real estate on the proceeds of the lots sold under Senate Bill 1128, the Senate re-drafted Bill 1128 in accordance with the indications of the Internal Revenue Service to provide for condemnation in bulk. Senate Standing Committee Report No. 483 states in relevant part:

In your Committee's conference with the officials of the Internal Revenue Service, as more fully discussed in the special committee report, a distinct impressions was conveyed to those as the meeting, that with respect to leases in existence at the time the legislation is enacted, no adverse income tax consequences are anticipated regardless of the approach taken to require the conveyance of fee titles by the lessors to lessees. As to leases executed after the date of enactment of the legislation, however, the tax status of the landowners could conceivably be affected adversely, depending on the approach taken. Your Committee finds that the one approach which can apply to both existing and future leases is condemnation of land in bulk.

Upon due consideration, your Committee has amended the bill. The amendments and the major provisions of the bill, as amended, are as follows:

• • •

2. Parts II, III and IV of the bill have been deleted. The substance of part II was incorporated into part I. Part III of the original bill provided for an option in the lessees to purchase the fee interest of the owner of the land and part IV provided for condemnation of individual leasehold lots by the Hawaii Housing Authority on the application of the lessee of a single lot. Both of these approaches could conceivably be applied to existing leases without any serious tax consequences to the landowners, although perhaps not as to future leases. However, since part IV of the original bill which provided for condemnation-in-bulk approach can apply to both existing and future leases without serious tax liability on the landowners, your Committee has adopted the part IV approach and deleted parts III and IV.

. . .

The residential lots acquired or developed are to be leased or sold, in fee simple, with sale being the primary method of disposition. All lessees of residential lots owned by the authority—whether they were lessees at the time of the acquisition of the tract by the authority or became lessees after the acquisition of the tract—have the option to purchase the fee at any time during the term of their leases.

44. Senate Standing Committee Report 483 on Senate Bill No. 1128 states in part:

#### Introduction

The primary purpose of this bill is to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots. In addition, the bill has as its purpose, the development of

condemned raw land into residential houselots and the protection of lessees residing on leaselots.

The intent of this bill, in one form or another, has been before the legislature for the past few years. Numerous hearings were held during those years by legislative committees at which the representatives of large, private landowners and others interested in the bill testified. One of the chief objections posed in the years past was the fear that forced sales of residential lots which are under leases may result in high income tax liability to the landowners under the applicable provisions of the Internal Revenue Code.

Your Committee during this session again held a number of conferences and hearings attended by the representative of the landowners to find possible ways and means of making more residential lots available in fee simple to the lessees. As a part of this effort, several members of your Committee, together with several members of the House of Representatives, met with the officials of the Internal Revenue Service at Washington, D.C., to explore the tax consequences to landowners under different legislative approaches to the problem of making the fee simple title to residential lots available to the lessees. A special committee report, outlining the results of that conference, was previously submitted to the members of the Senate.

Your Committee reviewed S. B. No. 1128 in the light of the special committee report. It held conferences with the representatives of the large, landowners and received their views on the bill. Your Committee's findings are as follows.

### Land Ownership

More than three-fourths of all privately held lands in the State are owned by a few trusts, estates and private persons. Much of these lands are situated in the urban areas on the island of Oahu. This virtual monopoly over privately held lands is traditional. It had its beginnings in the days of the Hawaiian monarchy when all the lands in Hawaii were owned by the kings and chiefs and few others to whom the kings and chiefs parceled out parts of the lands. Over the years, the lands held by the kings and chiefs and the few people passed into the hands of the small number of present day owners.

Although this pattern of land ownership (that is, the concentration of ownership in the hands of a few) may have suited the needs of the people of ancient Hawaii, it no longer meets the needs of the people of modern Hawaii. Hawaii has been in the throes of great economic boom, population increase, and social and political changes, especially since the advent of statehood. Much of this change has been taking place in the urban areas of Oahu where the few landowners own a bulk of the private lands.

The changing nature of our economic, social and political society has caused pressures to rise for residential houselots. The few landowners have made some of their lands available for development into residential lots. However, their efforts have not relieved these pressures, since their practice has been to lease, rather than sell in fee simple, the lots developed on their lands.

Owning property, especially real property on which one lives, together with all of its legal and equitable

rights, is an American dream. This desire for fee simple property has caused the pressures for residential fee simple houselots to become extremely acute. In the next twenty years, if the large landowners continue to permit the development of their lands into only leasehold residential lots, the leasehold residential lots will far outnumber the fee simple residential lots.

### Effects of Leases

One of the principal rules of economics is that prices are governed by the supply and demand for goods. The scarcity of fee simple residential lots has thus led to an inflation in the prices for fee simple residential lots, and this in turn has caused the prices for leasehold lots to increase as well.

A corollary to the rule that prices are governed by the supply and demand for goods is that as prices increase, the supply will correspondingly increase to meet the demand. In the case of residential fee simple lands in Hawaii, however, this principle has failed to operate. The reason for this is the hesitancy on the part of the few landowners to sell in fee the residential lots developed on their lands. Their hesitancy stems from two factors.

First, it is said that the instruments which created the estates and trusts, which are among the few, large, landowners, restrict sales of the lands held by the estates and trusts. The instruments were drawn many years ago, when the conditions which exist in Hawaii today were perhaps neither foreseeable nor anticipated. Second, charitable trusts enjoy tax-exempt status under the Internal Revenue Code, and the other nontax-exempt land-

owners are permitted to treat gains derived from sales of parcels of their real property as capital gains, if the sales are casual and limited in number. Sales of residential lots in fee simple in great numbers would cause the gains derived from such sales to be taxed as ordinary income, as to both tax-exempt and nontax-exempt landowners. The value of the lands held by the landowners has increased greatly since they were first acquired by the landowners many years ago. Thus, it is feared that taxation at the ordinary income rates would subject the landowners to large income tax liabilities.

The retention of ownership of lands by the large landowners, their practice of leasing the residential lots developed on their lands, the resultant failure of the supply to catch up with the demand for fee simple residential lots, and the high cost of land have affected not only the residential market but also the cost of other goods consumed by the people of Hawaii. Thus, it is clear that the social and political well-being of the people of the State. This situation is inimical to the public health, welfare and happiness of our people.

#### Nature of Leases

There are, indeed, those who would prefer to purchase leasehold residential lots for one reason or another. However, the scarcity of fee simple residential lots is an extremely limiting factor in the choice of the people to choose between fee simple lots and leasehold lots. As a result, the landowners who lease the residential lots developed on their lands have been able to include in the leases, provisions which are often financially disadvantageous to the lessees, restrict the freedom of lessees to

enjoy fully their leasehold estates, and are weighted heavily in favor of the landlord as against the lessees.

An example of this is the provision in leases calling for periodic renegotiation of rentals. While lease rentals may be low during the first twenty years of the lease term (sometimes because of the heavy premium which the lessees are required to pay on initial purchase), the lease rentals in future renegotiations have the tendency to rise many times above the rentals of the first twenty years. This rise occurs, because future lease rentals are usually based on the then market value of the land, and the market value of land in Hawaii has consistently risen. Under present trends, the market value of land in Hawaii will continue to rise in the foreseeable future.

Then, too, lessees often purchase leasehold estates in the hopes of improving their financial capabilities in future years to enable them to purchase fee simple residential lots, but the shortage of fee simple lots, and the rising prices for residential lots, have the tendency to cause the purchase of fee simple lots to be postponed and the lessees to be strapped to leases which become more and more undesirable as the lease terms run.

Legislation is necessary for the protection of lessees. The ability of the lessees to enjoy fully their leasehold estates and the enactment of legislation designed to promote this full enjoyment are indeed in the public interest, welfare, security and happiness of Hawaii's citizens.

(Exh. 121)



45. The House Standing Committee Report No. 827 on Senate Bill No. 1128 states in part:

The preference of fee simple ownership over leaseholds has been demonstrated in different areas and particularly in recent times:

(a) At a hearing on this bill, a representative of Chaminade College of Honolulu testified that over a year ago the College canvassed all 238 families in Chaminade Terrace when it was studying the possibility of moving Chaminade College to a new campus. Each family was asked if it would want to purchase its lot in fee simple if the decision to move was made. Of the 161 families who responded in time for their decision to be taken into account, 64% wanted to possess their lot in fee simple; 27% said they might want to buy; 2% said it was unlikely that they would want to buy; and 7% indicated that they would not buy, but preferred to continue the lease. A fair estimate of these results would be that about 80% preferred to buy and 20% preferred to continue the lease arrangement, even though the possibility to buy was offered them.

(b) Recently, the Halawa Hills Corporation was organized for the purpose of purchasing from the Bishop Estate the fee of the residential lots covered by 237 leases in the first increment of the Halawa Hills Estates subdivision and reselling the fee to the lessees of the respective lots. As of this date, 71% of the 237 lessees have made firm commitments, evidenced by deposits, to buy the fee. It is reasonably expected that many of the 29% not presently committed will decide to buy after this rather novel experiment of arranging for the pur-

chase of the fee through a community corporation shall have been finalized and closed.

(c) Other instances where the fee was sold to the lessee as in the early increments of the Pacific Palisades subdivision, or where the fee is being made available to the lessee as in portions of the Aina Haina subdivision, also serve to illustrate the need and desire for fee ownership. The Pacific Palisades and Aina Haina instances involve developers who have "sandwiched" positions between the large landowner-lessor and the buyer-lessee and stand to realize a profit. Notwithstanding the added cost of the profit to the developer, substantially all of the lessees have purchased fee interests in their leasehold lots in the early increments of the Pacific Palisades subdivision.

Owning property, especially real property on which one lives, together with all of its legal and equitable rights, is an American dream. Consistent with the promotion of the public welfare through the attainment of fee simple ownership of residential lots by the greatest number of people, the federal government has for many years made available the Veterans Administration home loan guarantee and Federal Housing Administration insurance programs to enable the masses to buy that dream. This desire for fee simple property has caused the pressures for residential fee simple houselots to become extremely acute. In the next twenty years, if the large landowners continue to permit the development of their lands into only leasehold residential lots, the leasehold residential lots will far outnumber the fee simple residential lots. (Exh. 121)

46. On June 2, 1975, Act 184, "Relating to Residential Leasehold," (Senate Bill No. 1200) was enacted, amending Act 307. Its findings and purpose are cited in Findings of Fact No. 6. (Exh. 150)

47. Also enacted on June 2, 1975 was Act 186, "Relating to Residential Leaseholds and the Acquisition by the State Through Condemnation of Lands in Fee Simple and The Disposition Thereof" (Senate Bill No. 1543). This amended Act 307 to include in the text of the statute itself, Legislative findings and declarations of necessity and purpose as cited in Findings of Fact No. 5. (Exh. 151)

48. Also enacted on June 2, 1975, was Act 185, "Relating to the Hawaii Lease Rent Renegotiation Relief Act" (House Bill No. 55a). This act, which placed a ceiling on the maximum amount of lease rent a lessor of a long term residential lease could charge at the renegotiation stage of the lease (Exh. 149), was part of the Land Reform Act package and represented another attempt by the Legislature to address problems created by the residential leasehold system of land tenure. (See Finding of Fact Nos. 6 and 7)

49. Among those giving input to the Legislature on Act 186 was the Department of Social Services and Housing.

50. Senate Standing Committee Report No. 233 on Act 186 states in part:

The purpose of this Bill is to reaffirm and reiterate the findings and declarations of necessity originally set forth in adoption of Act 307, Session Laws of Hawaii 1967, regarding the monopolistic tendency pervading the pattern of land ownership and disposition which was inimi-

cal to the public health, and to amplify and clarify those findings and declarations of necessity in view of the increasing detriment such tendency will impose on the public if left unchecked. (Exh. 146)

51. Legislative hearings on Act 184 were held on March 27, 1975. (Exh. 143) Among those testifying to the Legislature on Act 184 were the Department of Social Services and Housing; the Alii Shores Community Association (Exh. 140); Bishop Estate (Exh. 143); Crown Terrace Community Association (Exh. 143); the Estate of Harold K. L. Castle (Exh. 143);

52. Senate Conference Committee Report No. 24 on Act 184 states in part:

A. The findings and purposes of Act 307, Session Laws of Hawaii 1967, have been reaffirmed and modified to accentuate the importance of land to the lives of all residents of the State. The need for well-planned State action under its police power to accomplish a series of public purposes necessitated by increasingly difficult conditions arising from the leasehold system of land tenancy, and the importance of broadening the opportunity to acquire fee simple ownership in the State have been further specified. (Exh. 145)

53. Legislative hearings on Act 185 were held on February 21, 1975. (Exh. 139) Among those testifying to the Legislature on Act 185 was the Kaneohe Ranch (Exh. 143).

54. The House Standing Committee Report No. 501 on Act 185 states in part:

The purpose of this Bill are to correct several unconscionable features of current residential lease rent rene-

gotiation, and to properly and fairly establish the values inhering to the lessor and lessee.

Your Committee has found, because of the shortage of residential lands and the rapid appreciation in the value of such land, rents charged the lessee of residential leaseholds have increased greatly and all indications suggest even greater increases in the future. These rent increases, although reflecting the increases in value of the land under the lease, do not properly assign values to that party which paid for that value.

Residential improvements whether situated on fee simple or leasehold land, are essentially the same terms of price to the purchaser. The difference, however, is that the fee simple owner pays for these improvements once and for all, while the purchaser of improvements on leasehold land is often required to pay a premium for improvements at the outset and then pay, upon renegotiation, lease rent calculated upon the fair market value of the land as enhanced by the improvements already paid for, thus paying many times for the value which has been paid for at the time of purchase. (Exh. 144)

55. Senate Standing Committee Report No. 892 on Act 185 states in part:

The existing monopolistic land structure in the State inequitably favor the lessor over the lessee. One such inequality allows lessors to charge lease rents based not only on the raw value of the property but also on improvements on the property paid for by the lessee and on the value accruing thereon. The end result is that the lessee pays for an investment made by himself. This bill alleviates this problem by establishing guidelines, and

procedures in renegotiation which did not exist previously. These procedures act as a protection for the lessees.

Your Committee finds that this type of legislation is long overdue and is to the benefit of all the people of the State. (Exh. 144)

56. Senate Conference Committee Report No. 25 on Act 185 states in part:

Your Committee on Housing has found, through numerous witnesses testifying during the course of the legislative session and through other sources, that renegotiated residential lease rentals have increased to such extreme levels such that the public health, safety and welfare of the people of Hawaii are severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm. These effects have been brought about by the fact that leasehold residential developments have dominated the housing market on Oahu from the 1950's. This has compelled thousands of people in the State to accept, without any meaningful choice, leasehold residences to satisfy their housing needs, and this trend is likely to continue unabated in view of the limited availability of land for residential purposes. The initial lease rents charged the residents of leasehold property were low and within the range which the public could afford. However, in recent years renegotiation of rents have increased tremendously and have been unconscionably imposed upon these lessees by the lessors.

The lessees are seriously affected by the unequal bargaining power between themselves and the lessors who

bargain in a context of a market place which is less than free. In instances, lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process. This unequal bargaining relationship exists today despite the rights granted to lessees under Part III of Act 307, passed some seven years ago. The unequal bargaining power is mainly due to the oligopolistic land ownership in this State. This oligopolistic market has contributed to the lack of competitive bargaining and has foreclosed a free market.

The legislative findings contained in this bill set forth these reasons and others in declaring an emergency in order to protect the public health, safety and welfare of the people of Hawaii. (Exh. 144)

### III. Information Before the Legislature in 1967 and 1975

57. The Legislature, in enacting Act 307 in 1967, Act 184 in 1975, and Act 186 in 1975, had sufficient information before it and available to it, and this Court finds that (1) the enactment of the foregoing acts; (2) the acts themselves; and (3) the declarations of necessity, purpose and legislative findings all are reasonable, and have a rational basis.

58. Copies of all reports, papers and other documents published by the Department of Planning and Economic Development ("DPED"), State of Hawaii were, pursuant to department policy, sent to the Governor, Lt. Governor, to all agencies required by law to receive them, the Legislative Reference Bureau, the state archives and to the state legislature and to each individual legislator. (Downs: 6/1/83)



59. Some of the documents published by the Department of Planning and Economic Development in evidence in this trial which were sent to the legislature are *Public Land Lease Policies 31 States and Hawaii*, Economic Planning and Coordination Authority ("EPCA") Staff Report No. 10 (1956) (Exh. 154); *An Inventory of Available Information on Land Use in Hawaii*, Vol. I EPCA (1957) (Exh. 1955); *Major Landholdings In Hawaii, Ownership Patterns And Leasing Policies*, EPCA Staff Report No. 14, (1957) (Exh. 157); *An Inventory of Available Information on Land Use in Hawaii*, Vol. 2, EPCA (1957) (Exh. 158); *Land Use Districts For the State of Hawaii*, DPED (1963) (Exh. 167); *The State of Hawaii Data Books*, DPED (1967) (Exh. 175); *Governor's Statewide Conference on Housing*, DPED (1970) (Exh. 183); *Housing In Hawaii: Problems, Needs and Plans*, DPED (1971) (Exh. 185); *Central Oahu Planning Study*, DPED (1973) (Exh. 191); *The State of Hawaii Data Book*, DPED (1975) (Exh. 202); *Housing For Hawaii's People*, DPED (Exh. 205); *Housing For Hawaii's People, Technical Appendix*, (1977) (Exh. 206); *The Housing Need Group on Oahu Housing Follow-up Study No. 1*, DPED (1978) (Exh. 208); *State of Hawaii Data Book*, DPED (1981) (Exh. 217).

60. Hanako Kobayashi has been research librarian at the Legislative Reference Bureau ("LRB") for the past 23 years. The research staff at the LRB is an arm of the State Legislature and is connected with the drafting and research of bills. As a matter of policy, publications produced by the LRB are distributed widely, primarily to all legislators, the Governor, Lt. Governor, the executive departments, the Judiciary, and various local and mainland libraries. And, as testified by Ms. Kobayashi, all publica-

tions of the LRB since 1959 have been distributed to the individual legislators and are also held in the LRB library where they are readily accessible to the legislators. (Kobayashi: 6/1/83)

61. Some of publications of the LRB in evidence in this trial and which were sent to the legislature and kept in the library where they were available to or before the Legislators were *A Study of Large Landowners in Hawaii*, Clinton Tanimura, Robert Kamins, LRB Report No. 2 (1957) (Exh. 156); *Public Land Policies of the United States and the Mainland States*, Charles Javes, LRB (1961) (Exh. 163); *Major Landholdings in Hawaii Data On Land Ownership and Land Use*, LRB Request No. 7969 (1961) (Exh. 164); *Public Land Policy In Hawaii*, Robert Horwitz, LRB Report No. 2 (1964) (Exh. 171); *Public Land Policy In Hawaii: Land Reserved For Public Use*, LRB Report No. 2 (1966) (Exh. 172); *Public Land Policy in Hawaii: Major Landowners*, Robert Horwitz, LRB Report No. 3 (1967) (Exh. 1976).

62. The Land Study Bureau ("LSB") was initially created by the Legislature in 1955 specifically to study the question of the impact of land ownership patterns on the use of the land resources of the state and to study the residential leasehold problem. (Bell: 6/1/83)

63. The following reports were before the Legislature and/or were used by Mr. Donald Bell, while a consultant to the territorial and state legislature from 1951 to the mid-1960's, and to the Lands Committee from 1965 to 1966: *Land Study Bureau (Technical Paper No. 1) Hawaii's Fu-*

*ture Population*, Gilbert Wong, Land Study Bureau (1959) (Exh. 161); *Land Use On The Six Major Islands of Hawaii*, Land Study Bureau Report No. 3 (1960) (Exh. 1962); *Urban Development on Oahu, 1946-1962*, Louis Vargha, Land Study Bureau (1964) Ex. 165 A, ); *Detailed Land Classification—Island of Oahu*, Larry A. Nelson, Land Study Bureau Bulletin No. 3 (Exh. 166); *Residential leasehold Subdivisions, Island of Oahu*, Louis A. Vargha, Land Study Bureau Report No. 7 (1963) (Exh. 168 A, B, C); *Economic View of Leasehold and Fee Simple Tenure Residential Land in Hawaii*, Louis A. Vargha, Land Study Bureau Bulletin No. 4 (196) (Exh. 169 A, B); *Urban Land Development on Oahu 1962-1963*, Louis A. Vargha, Land Study Bureau Report No. 1 (1964) (Exh. 170 A, B). (Bell: 6/1/83) (See also Appendix "A" attached hereto.)

#### IV. Bases for the Legislative Findings Expressed in Act 307, Act 184, and Act 186.

64. In 1967, in Section 1 of Act 307, and again in 1975, in Section 1 of Act 184; and in Sections 1 and 2 of Act 186, the legislature made certain findings upon which the Land Reform Act is predicated which are provided in Finding of Fact no. 5. Given the documentary support for these findings, some of which was available to the legislature in 1967 and in 1975, and the evidence presented in the case, those legislative findings are reasonable, rationally based and substantially correct and are reaffirmed in their current context.

##### A. Rapid Urban Development

65. The legislature found in Act 307 that the demand for single family residences had increased sharply, es-

pecially in the rapidly developing urban areas of the State. Much of the land in this rapidly developing urban area was owned by a few private landowners. See Act 307, Sections 1(b), 1(c) and 1(h).)

66. The State was in a stage of rapid urban growth during the period that led up to this legislation as demonstrated by the rapid expansion of the State's economic activity and the population of the counties in the State. The area from downtown Honolulu out to Hawaii Kai, the Kaneohe-Kailua area, and the areas around Pearl Harbor can be termed an "urban corridor." (Hillendahl: testimony on 5/24-26/83)

67. A report available to the legislature supports this finding of rapid urban development, "Major Land Holdings in Hawaii", EPCA Staff Report No. 14 (1957) (Exh. 157) which states in part:

The Island of Oahu is currently experiencing the pains of a growing population and the resulting pressures on its limited land resources. Oahu already has a density of population greater than Japan or the United Kingdom. Land costs have soared all but pricing out many would-be industrial enterprises and causing the cost of residential lots to climb much higher than the mainland average.

Almost 29 per cent of the total land area on Oahu is controlled by government while 49 per cent is held by private owners of 5,000 or more acres.

. . .

Government and the 60 largest landowners control about 88% all land in Hawaii. It is evident if these

relatively few owners wish to retain title to their land a system of land tenancy ensues.

### Land Ownership

The pressure of a growing population on limited land resources is being felt most severely on Oahu.

#### B. Concentration of Landownership

68. The legislature found that landownership in Hawaii is concentrated in the hands of a few. This finding was made in 1967 (Act 307) and again in 1975 (Act 184 and Act 186). (See Act 307, Section 1(c); Act 184, Section 1(a) and Act 186 Section 1(a)(1).)

69. Statistical evidence on land ownership on Oahu supports the finding of concentration of landownership and shows that the major private landowners (those who own more than one percent of the land on Oahu) own over one-half of the land on Oahu and account for the ownership of over 80 percent of the privately owned land. The Bishop Estate is the largest private landowner accounting for the ownership of 15 percent of all land on Oahu. (Hillendahl: 5/24-26/83) The profile of landownership on Oahu as of 1978 is as follows:

Owner	Acres (Acres)	Share of Total	
		Land on Oahu (Acres)	Private Land (Per- centage)
Federal Gov. ....	50,634	13.6	—
States & County Gov. ....	73,081	19.6	—
Total Gov. ....	123,715	33.2	—
Major Private Landowners ....	199,761	53.5	80.1
Bishop Estate ....	(56,513)	(15.1)	(22.7)
Small Landowners ....	49,740	13.3	13.9
Total Private Land ....	249,501	66.8	100.0
(Exh. L-104)			

70. In 1964, the six major landowners' holdings accounted for over 45 percent of the land owned on Oahu and were profiled as follows:

**MAJOR PRIVATE LANDOWNERS: OAHU  
1964**

<u>Name of Owner</u>	<u>Acres Owned In Fee Simple</u>	<u>Fee Acres as Per- centage of Total Acreage of Island</u>	<u>Cumulative Percentage</u>
Bernice P. Bishop Estate . . . . .	59,007.10	15.50	15.50
James Campbell Estate . . . . .	50,260.00	13.20	28.70
Castle & Cooke, Inc. . . . .	42,398.65	11.13	39.83
Harold K. L. Castie (Kaneohe Ranch) . . . . .	9,336.87	2.45	42.28
Zion Securities Corp. . . . .	6,374.00	1.67	43.95
McCandless Heirs (Elizabeth Marks, et al.) . . . . .	6,286.00	1.65	45.60
(Exh. L-104)			

71. The profile of the lands owned by the Bishop Estate in Hawaii breaks down as follows:

	<u>Bishop Estate (Acres)</u>	<u>Total Land (Acres)</u>	<u>Share Bishop/ Total Land (Per- centage)</u>
State on the Whole:			
Share of State Total . . . . .	341,749	4,045,511	8.45
Share of Private Land . . . . .	341,749	2,340,821	14.59
Oahu:			
Share of Oahu Total . . . . .	56,513	373,216	15.1
Share of Private Land . . . . .	56,513	249,501	22.7
Share of Single Family Residential Use . . . . .	4,881	24,908	19.6
Share of Hotel, Apartment and Resort Use . . . . .	555	2,455	18.5
Share of Land Classed Unimproved Residentail . . . . .	2,594	10,640	24.4
(Exh. L-10)			

72. Further, as graphically established on maps attached to the Land Study Bureau Reports of 1963 and 1974, which show land ownership and projected urban

development on Oahu, the urban lands surrounding Honolulu, then projected as future residential areas, were almost all owned by the major private land owners. (Exh. 168a, b, c, 169a, b, 170a, b, L-4, L-104)

73. Reports before the legislature in 1967 support the legislature's findings on the concentration of land ownership. *Public Land Policy In Hawaii: Major Land Owners*, LRB Report No. 3 (1967) (Exh. 164) states, "Land ownership in the State of Hawaii remain, as it has been since the time of Kamehameha I, highly concentrated." Additionally, in *Major Landholdings in Hawaii, Ownership Patterns and Leasing Policies*, EPCA Staff Report No. 14 (1957) (Exh. 157), one finds the following:

*page 3:*

"1. The general practice of land tenancy in Hawaii stems to a great extent from the land ownership pattern. Hawaii's land picture is characterized by large landowners which control the great part of total land area. Federal, Territorial, and County Governments control some 42 per cent and the 60 largest landholders about 46 per cent of all land in the Territory. If the large land owners wish to retain title to their land, as they have for the most part in the past, and they do not utilize all the land themselves, then a system of land tenancy results."

*page 5:*

"Private Lands:

The 12 largest landowners in the Territory control 30 per cent of the total land and 52 per cent of all private



lands. The 60 largest owners control 46 per cent of all land and 80.29 per cent of private land. Only 11 per cent of all land is held by owners with less than 5,000 acres."

74. This concentration of landownership gives rise to potential monopolistic practices on Oahu by those few landowners. These monopoly powers can be exerted (a) in the initial development of residential houses by the number and type of houses released on the market; (b) when lease rents are renegotiated; and (c) when the leasehold is converted from lease to fee. (Mak: 5/31-6/1/83)

#### C. Policy of Leasing Rather Than Selling

75. The legislature found in 1967 and 1975 that these large landowners followed a policy of developing the residential lands in leasehold rather than selling in fee simple. (See 307, Sections 1(e) and (h); Act 184, Section 1(B) and Act 186, Section 1(a)(1).)

76. Statistical evidence supports the above finding that these large landowners lease rather than sell the land in residential areas. From 1946 to 1963 the percentage of leasehold residential lots subdivided in Honolulu increased to such an extent that by 1963, 81.6 percent of lots developed in the urban corridor areas were leasehold and 18.4 percent, fee simple. On the entire island of Oahu, 71.1 percent of the residential lots were developed in leasehold and 28.9 percent in fee simple. (TR. Vol. XXXIII, p. 114-116, Exh. L-104). Additionally, statistics show that from 1961 to 1974, 96.6 percent of the tract houses sold in the area from Kaimuki to Koko Head were leasehold, (Exh. 104) and, from 1975 to 1980 that percentage increased to

99.4 percent. Further, the net reduction in the total acreage of land owned by the major land owners from 1950 to 1964, and more specifically the largest landowners, the Bishop Estate, Campbell Estate and Castle Estates, was less than 10 percent. (Exh. L-104) (Hillendahl: 5/24-26/83)

77. Statistical evidence supporting the finding that residential development was occurring primarily as leasehold was available and before the legislature in *An Economic View of Leasehold And Fee Simple Tenure Of Residential Land In Hawaii*, LSB Bulletin No. 4 (1964) (Exh. 169a, b). Further support for this finding can be found in *Major Landholdings In Hawaii*, Legislative Reference Bureau (1961) (Exh. 14) which states: "Houselots: From 1950 to 1960 . . . [o]n Oahu, about four-fifths of the lots were leased (4,156 out of 5,227) . . ."

#### D. Shortage of Fee Simple Residential Property

78. The legislature found in 1967 and 1975 that the concentration of landownership in the hands of a few combined with the practice of those landowners to lease rather than to sell in fee simple and the growth in population and the increased demand for residential lots has led to a serious shortage of residential fee simple property at affordable prices in the urban areas. (See Act 307, Section 1(f); Act 184, Section 1(c); and Act 186 Section 1(a)(2).) (Also, Hillendahl: 5/24/83-5/20/83)

79. Because the government has zoned an adequate amount of land residential, restrictive government zoning cannot be said to be the sole cause of the shortage of residential fee simple land available for development. (Exh. L-10) (Hillendahl: 5/24-26/83)

80. *Housing in Hawaii: Problems, needs and Plans*, Marshall Kaplan, Gans, Kahn and Yamamoto, DPED (1971) (Exh. 185) states in part:

"While there is certainly no scarcity of land per se in Hawaii its availability for housing is limited by a combination of factors involving location, concentration of ownership, and state and local land use and improvement policies."

(Tr. Vol. XXXIII, p. 13)

In *An Economic View of Leasehold and Fee Simple Tenure of Residential Land In Hawaii*, Louis A. Vargha, L.S.B. Bulletin No. 4 (1964) (Exh. 169a) states in part:

"It is apparent that leasehold lots as a proportion of total subdivision has increased tremendously and if the current trend continues, virtually all housing in newly developed areas will only be available with leasehold land tenure."

(Tr. Vol. XXXIII, p. 139)

81. The two reports cited above were before the legislature for their consideration when this legislative finding on the shortage offer simple residential property was made.

#### E. Lack of Choice To Own or Lease

82. The legislature found in 1967 and 1975 that because of a combination of the concentration of land ownership in the hands of a few, the practice of those landowners to lease rather than sell the residential developments, and the demand for residential lots, people of the State who wished to reside in the developing urban areas have been deprived of a choice of whether to own or lease the land on which

their homes are situated. (See Act 307, Section 1(f) and Act 186, Section 1(a)(3).)

83. Statistical evidence shows there is relatively little difference between the price of a comparable leasehold house versus fee simple house. In fact, in 1974, 1976 and 1978, the median price of homes on leasehold land exceeded those on fee simple land. The purported economic advantage to the homeowner of leasing instead of purchasing his property does not exist. Therefore, because most homes in the urban area have been recently developed are leasehold, the homebuyer has had relatively little choice of whether to lease or buy in fee simple. (Hilliendahl: 5/24-26/83)

84. *An Economic View of Leasehold and Fee Simple Tenure of Residential Land in Hawaii*, Louis A. Vargha, L.S.B. Bulletin No. 4 (1964) (Exh. 169a) states:

The direction of urban growth on Oahu indicates that most of the single family residential development during the next decade will be on land whose owners have previously made land available almost exclusively on a leasehold basis. This supports the contention that the trend toward a higher proportion of leasehold development will continue.

*In the future, it would appear that most individuals seeking new homes on Oahu will have little choice in land tenure, except at locations less convenient to activities in Honolulu. (Emphasis added.)*

Further, *Report To The People*, Technical Report No. 2, (1975) prepared by Marshall Kaplan, Gans, Kahn and Yamamoto, for the State Land Use Commission (Exh. 199), states: "... for all major landholders, less-than-fee

approaches to land sales tend to [the] . . . maintenance of a monopolistic or oligopolistic status in the land market."

Additionally, in *Housing Costs in Hawaii*, Report To The Legislature of the State of Hawaii (1969) (Exh. 197) states:

"Open competition in the sale of housing, where most families can be potential buyers and have a wide range of types of houses, locations and a prices within their reach, is not likely to occur in Honolulu *where land and its ownership* is limited and the construction industry depends on long supply lines and relatively few suppliers." (Emphasis added.)

#### F. Inflation of Residential Land Values

85. The legislature found in 1967 and in 1975 that the shortage of fee simple residential property and the restriction of choice between fee simple and leasehold have caused the prices for both leasehold and fee simple residential land to be inflated. (See Act 307, Section 1(g); Act 184, Section (1)(d); and Act 184, Section 1(a)(2).)

86. The leasehold system in Hawaii has contributed to the inflation of residential land values. (Hillendahl: 5/24-26/83)

87. The limited supply of any kind of land in this island economy is a factor in the high cost of land in Hawaii. From 1960 to 1971, the price of property in Hawaii doubled, increasing at a rate of 6 percent per year compared to a nation-wide increase of 4.5 percent over the same period. The problem of high land costs is aggravated by the shortage of fee simple land and the demand for it by a growing population which must have housing. This scar-

city makes fee simple land very expensive and the high price of fee simple land adversely affects the price of leasehold property causing it to increase. The evidence shows that the prices of fee property and leasehold property are at least comparable and rise together. Leasehold property prices are furthermore kept high by the practice of incremental development as described in Finding of Fact No. 138. (Hillendahl: 5/24-26/83)

88. This principle of supply and demand, and the effect of leasehold residential land prices on it, were also reflected in the Senate Committee report on Senate Bill 1128 (Act 307) which stated in part:

"One of the principal rules of economics is that prices are governed by the supply and demand for goods. The scarcity of fee simple residential lots has thus led to an inflation in the prices for fee simple residential lots and this, in turn, has caused the prices for leasehold lots to increase as well." (Hillendahl: 5/24-26/83)

89. Reports which were before the legislature which support its finding that there was a resulting inflation of residential land caused by the residential leasehold system include *An Inventory of Available Information on Land Use in Hawaii*, Harold Bartholomew, EPCA (1957) (Exh. 155); *Land and Housing On Oahu*, Land Study Committee of the Honolulu Chamber of Commerce (1959) (Exh. 160); *Urban Development On Oahu, 1946-1962*, Louis A. Vargha, Land Study Bureau (1964) (Exh. 165); *Residential Leasehold Subdivisions Island Of Oahu*, Louis A. Vargha, LSB Report No. 7, (1963) (Exh. 168A, b, c); *An Economic View of Leasehold and Fee Simple Tenure of Residential Land*

*In Hawaii*, Louis A. Vargha, LSB Bulletin No. 4 (196) (Ed. 169a, b); *Housing Costs In Hawaii*, Report to the Legislature of the State of Hawaii (1969), Submitted by the Interim Committee on Housing (Exh. 177); *Housing In Hawaii: Problems, Needs and Plans*, Marshall Kaplan, Gans, Kahn, and Yamamoto, DPED (1970) (Exh. 185); and *Central Oahu Planning Study: Technical Supplement 3: A Survey of Vacant Residential Lands Within Honolulu Commutershed* (January, 1973) DPED (Exh. 191).

In *An Economic View of Leasehold and Fee Simple Tenure of Residential Land In Hawaii* at page 49, Vargha states: "To the degree that concentration of ownership of land characterizes the urban fringe of Honolulu, the direction of growth can be determined by landowners. *Likewise, concentration of ownership increases price leverage.*" (Emphasis added)

#### G. Financially Disadvantageous Terms And Restricted Freedom To Enjoy

90. The legislature found in 1967 and in 1975 that the shortage of fee simple residential land, the artificial inflation of land value, and the restriction on people of a real choice between fee simple and leasehold have enabled lessors to include terms in leases which were financially disadvantageous to the lessees and which restricted their freedom to fully enjoy their leasehold estates. (See Act 307, Section 1(g) and Act 186, Section 1(a)(3).)

91. Long term residential leases in Hawaii contain terms which are financially disadvantageous to the lessee: Rents beyond the first fixed-periods are uncertain. The lessee is required to negotiate a rent escalation in the mid-



dle of the lease, when he is captive and has no real bargaining power. Upon the expiration of the lease, the land on which he lives reverts to the landowner.

The problem caused by reversion is demonstrated in Hawaii Kai where some 30 different occupants along the waterfront lost their property through reversion when the lessor refused to provide another lease. Although the lessee may have the option of removing the improvements on the land, houses built of single wall and rock wall on a concrete slab usually cannot be moved.

The lessee who is faced with imminent renegotiation and who decides to sell his home rather than pay the increased lease rents must often sell his property for less than comparable properties, which demonstrates that property values fall for those properties facing imminent renegotiation. The lessee will face further difficulty in selling his home as banks will only finance the purchase of those homes on leased land for which the lease has a specified number of years remaining. If the remaining term of the lease does not meet the bank's requirement, the lessee must obtain an extension on the lease which puts him at the mercy of the lessor who may not grant the extension or may demand higher lease rents for the new fixed term. Indeed, the Bishop Estate froze, for a period of time, the granting of any extensions on leases in Waialae Kahala, causing great difficulty to those lessees who needed the extension in order to sell. (Hillendahl: 5/24-26/83; Tr. Vol. XXXIV, p. 33; and Mak 5/3/83-6/1/83)

92. The leasehold system also gives rise to emotional hardship on the lessee by creating uncertainty as to future lease rents and as to renewal of the lease upon expiration.

93. The financial disadvantage of buying leasehold also affects people other than the lessees. The evidence shows that (a) the median price of leasehold houses exceeded the median price of fee simple homes in 1974, 1976 and 1978; and (b) it is the lower income people who prefer and actually do buy fee simple property while the higher income people purchase leasehold. This indicates (a) leasehold really does not provide less expensive housing for the people of the State; (b) the lower income group, who can afford to buy a home and are faced with a choice of buying leasehold or renting, do not rent but buy smaller fee simple homes; and (c) the lower income group, who more strongly prefer fee simple housing, therefore, are more adversely affected by the leasehold system which has caused fee simple prices to rise. (Mak: 5/31-6/1/83)

94. Long-term residential leases restrict the lessees' freedom to fully enjoy their leasehold estates. Lease terms require the lessee to submit to inspections at the lessor's request and to apply to the lessor for authorization for various improvements and changes a lessee may wish to make on the property. (Hillendahl: 5/24-26/83) Although restrictive covenants in the lease may have been included to prevent unsightliness or activities detrimental to the neighborhood community, many of these restrictive covenants are not always enforced. (Ikeda: 5/19/83)

95. Reports before the legislature at the time this finding on financially disadvantageous terms was made support this finding. In *An Economic View of Leasehold and Fee Simple Tenure of Residential Land in Hawaii*, Vargha states:

For similar housing, it is unlikely, under existing leasehold arrangements, that leasehold tenure creates any investment advantages for a family.

• • •

Only in the initial period of a lease, when leasehold property rights may appreciate in value, is there any basis for expecting a financial advantage which could accrue to leasehold tenure. In specific cases the rate of appreciation of leasehold property values could exceed that for fee simple values.

In the latter stages of the leasehold, the situation is biased against leasehold have ownership with the value of leasehold property rights decreasing in the period when annual ground rents could be expected to increase.

(Exh. 169a)

96. *Housing Costs In Hawaii*, Report to the Legislature of the State of Hawaii (1969) (Exh. 177), states that the lessee homebuyer must pay for the offsite improvement costs even though he does not obtain the benefit he would receive if he were a fee homebuyer.

*Housing In Hawaii: Problems, Needs and Plans*, Marshall Kaplan, et al. (1971) (Exh. 185), states:

"Further, the buyer of a home on leased land apparently does not pay proportionately less than on fee simple, even though he gains no equity in the land. A number of costs other than raw land value are apparently being passed on in the sales price to the leasehold home buyer."

97. Also included in the above report by Louis A. Vargha, is support for the legislative finding on the restric-

tion to fully enjoy the leasehold estate. That report refers to the limitations as to the length of time a lessee holds the leasehold and the disposition of the improvements upon termination of the lease. The report states in part:

Thus, a lessee buys leasehold rights much as one buys fee simple rights. The major difference between fee and leasehold rights is that the leasehold rights are not "perpetual" as are fee simple rights.

. . .

The important limitation of leasehold rights are found in the area of voluntary restrictions—that is the restrictive covenants of the lease to which the lessee voluntarily commits himself.

... the specific covenants of a lease detail the distinctions between leasehold and fee simple rights, aside from the immediate difference from fee simple rights common to all leaseholds—duration. Thus, specific covenants of lease agreements can have important bearing upon the economic effects of leasehold land tenure.

. . .

The lessee is responsible for protecting the landowner's interests in the site.

. . .

Lease agreements delineate the landowner's right to enter the property and to determine whether his interests are being protected.

. . .

In addition, potential limitations of a lessee's freedom of action are commonly found in lease provisions stip-

ulating that the land owner must approve the sale of the property (including the leasehold right).

. . .

Such restrictions may also affect the ability of the lessee to rent his house and, perhaps more importantly to many lessees, may also affect the lessee's ability to devise his property.

(Exh. 169a)

#### H. Economic Effects of Lease Rent Renegotiation

98. In 1975, the legislature found that residential leasehold land tenure has and will continue to have undesirable economic effects as lease rents are increased 400 to 1000 percent upon renegotiation. (See Act 184, Section 1(D) 4-7 and Section 1(E).)

99. The lessee faced with renegotiating his lease rent for a new fixed term is in a greatly disadvantaged position with respect to the large landowners-lessor. The lessor, under the terms of the lease, is not restricted in the amount of lease rent he can charge at the renegotiation stage. Although Chapter 519, Hawaii Revised Statutes, limits the renegotiated lease rent to 4 percent of the fair market value of the land, the resulting rent is still a dramatic increase for the lessee. The lessor is under no obligation to sell the fee title, and is under no obligation to renew the lease. The lessee is faced with a situation where his home, often his single largest investment, is situated on land owned by someone else.

100. The Bishop Estate, through its representative Paul Cathcart, stated that it is now basing its new renegotiated lease rents for Hawaii Kai on an appraised valuation of up

to \$20 per square foot. Thus, a family with a 10,000 square foot lot appraised at \$20 per square foot, would be required to pay \$8,000 per year in lease rent alone. If that family had an income of \$30,000 per year (in 1980 approximately 29 percent of the families in Hawaii Kai had a household income totaling less than \$30,000 per year), it would spend 26.7 percent of its income just on lease rent. When other housing costs such as mortgage payments, insurance and other direct housing expenses are considered, these families would be spending far more for housing than the 25 percent of household income traditionally considered reasonable by the FHA, the VA, and banks and lending institutions. (Hillendahl: 5/24-26/83)

101. If lease rents are renegotiated at the Bishop Estate's projected valuation of \$20 per square foot, or \$4,800 per year for a lot of 6,000 square feet, a Kamiloiki lessee could be paying in addition to his other housing costs, \$400 per month for lease rent. (Hillendahl: 5/24-26/83)

102. The impact of increased lease rents results in even greater hardship on retired people. A retired person's income is generally equal to 40 percent of his income as a worker. Retirees in Hawaii Kai whose rents are renegotiated at the Bishop Estate's announced \$20-per-square-foot valuation, and whose income is \$22,000 per year or less, will be spending from 27 to 55 percent of their income on lease rent alone if their lots measure 6,000 square feet, and between 44 and 91 percent of their income on lease rent if their lots measure 10,000 square feet. (Hillendahl: 5/24-26/83)

103. Jacob S. Jichaku was a Tract A lessee. He first moved into his home in 1956. He was the third owner of the house built in 1951. Tract A, located adjacent to the shopping center in Kahala was one of the first tracts developed in Waialae-Kahala. The lessor-landowner was Bishop Estate. For the first 18 years of the lease the rent was set at \$98 per month and for the next seven years, at \$300 per year. This would equal the first 25 year fixed term.

104. On December 24, 1975, the Bishop Estate sent to Mr. Jichaku and to other Tract A lessees a letter in which it announced the new lease rent for the next fixed term of the lease. The lease rent demanded of Mr. Jichaku was \$3,313 per year for the remaining 30 year fixed period. It also offered the alternative of a new 55 year lease with the lease rent for the first 15 years at \$2,950 per year and the next 10 years at \$4,430 per year. The Bishop Estate gave Mr. Jichaku and other lessees until January 15, 1976, or less than one month, to respond.

105. On December 31, 1976, the Bishop Estate sued Mr. Jichaku and the other lessees in Tract A claiming Act 185 was unconstitutional and the lease rents demanded were proper.

106. As a result of the demand letters sent to the Tract A lessees and the lawsuit, the leases in the community organized through the Kahala Community Association to discuss what to do about the 1100 percent increase in lease rent. The Tract A lessees had meetings also attended by other lessees of other tracts whose fixed terms of their leases would expire the next year. The Association formed various committees, such as the lease rent committee, fee purchase committee, and a steering committee and named



block captains. During this period, the Tract A lessees continued to pay the old lease rent of \$300 per year.

107. From Mr. Jichaku's observations, and the survey conducted by the Community Association, the average age of the Tract A lessee was about 62.

108. After the trial on the complaint was concluded, the Bishop Estate offered it other lessees in Kahala, the opportunity to purchase their lots in fee. The Tract A lessees were forced to file a condemnation action through the HHA under HRS Chapter 516 in order to buy the fee. Mr. Jichaku purchased the fee title to his lot, as did all but one of the Tract A lessees.

109. Sakae N. Komenaka was also a lessee in Tract A since 1964. Her initial lease rent was between \$100 and \$200 per year. In December, 1975, she received a letter from Bishop Estate demanding increased lease rent of \$2,667 per year, the year before she was to retire from her position at the University of Hawaii.

Mrs. Komenaka rented out the main house on the property and moved into a smaller house in the back when she retired and had to live on a fixed income. She could not have been able to pay the increased lease rent, and thought she would have to move off the property and possibly impose on her children by living with them.

Fortunately, her children were willing to help her to buy the fee simple title from Bishop Estate. Although her payments on the fee purchase were more than what her increased lease rent would have been, she was willing to accept her children's contribution towards the purchase of the fee because the property would ultimately be theirs.

110. James A.W. Duncan is a lessee living in the West Marina area of Hawaii Kai, the first development in the Hawaii Kai area owned by the Bishop Estate. Mr. Duncan, a part-Hawaiian, has lived in the area for 12 years and was born and raised in Hawaii.

111. If Mr. Duncan were faced with lease rent of \$4,500 per year, which the Bishop Estate has stated they would charge if the lease rents in the area were to be renegotiated today, Mr. Duncan would have to sell his house and move probably to the mainland. The home would be difficult to sell because of the impending high lease rent and the move to the mainland would be unsatisfactory to him as he wants to stay in Hawaii.

112. Mr. Oran D. Spotts, Jr. is a lessee in Ainakoa, an area owned by Bishop Estate on the Kokohead side of Kahala Mall Shopping Center on Kalaniana'ole Highway. He has lived in his home for about 12 years and was raised in the Ainakoa area. For the next term of the lease, the Bishop Estate has demanded an increase in lease rent as of December 31, 1982, from \$300 per year to \$5,512 per year for the next 15 years, or \$5,580 per year for the next 10 years, with step-ups to \$9,770 per year for the second 10 years, and \$17,090 per year for the third 10 year period. Mr. Spotts cannot afford this increase and has not paid the new lease rent. He intends to stay on the lot paying the old lease rent until his lessor, the Bishop Estate, evicts him.

#### I. The Economy of the State

113. The legislature next found in 1975 that the economy of the State was adversely affected by the inflation

of residential land values caused by the leasehold system. (See Act 186, Section 1(a)(4).)

114. The amount of money lost to the state's economy, because of the leasehold system, will increase as rents are renegotiated. No portion of lease rent paid for the lot upon which a taxpayer is domiciled is deductible from his gross income, whereas the portion of payment for a fee simple corresponding to interest due a mortgagee is deductible and reduces the taxpayer's taxable income, resulting in less taxes owed the federal government. Allowing lessees to purchase the fee simple on which their homes are situated would result in the circulation in the local economy of dollars which would otherwise go to the federal government. (Mak: 5/31/83-6/1/83)

115. *Major Landholdings in Hawaii, Ownership Patterns and Leasing Policies*, EPCA Staff Report No. 14 (1957) (Exh. 157), states in part:

"The general practice of land tenancy in Hawaii has resulted from the fact that government and a limited number of private owners control the greater part of economically exploitable land. *The leasing policies of these major owners have a direct effect on the economic utilization of land and an indirect effect on the prosperity of the community.*" (Emphasis added.)

#### J. Cost of Living in Hawaii

116. The legislature found in 1975 that the cost of living in Hawaii was and had been high and that a contributing factor to the high cost of living was the high cost of land and that stabilizing or at least slowing the inflation of land values would curb the rising cost of living

and contribute to the welfare of all people of the State by improving their standard of living. (See Act 186, Section 1(a)(6).)

117. The cost of living in Hawaii continues to be high. Contributing to the high cost of living, and therefore adversely affecting many segments of Hawaii's population, is the high cost of land inflated by the leasehold system. (Hillendahl: 5/24-26/83).

#### K. Quality of Life

118. The legislature in 1975 also made various findings concerning the quality of life in Hawaii as it is affected by the inflationary trend in land and the inflationary total cost of living. The legislature found that such things as basic nutritional and health care, safe and healthy housing and social and economic stability will all be adversely affected by this inflationary cost of living if it remains unchecked. These legislative findings, and as they are more particularly stated in Act 186, Sections 6, 7, 8, 9 and 11, have a rational basis.

119. The legislature's findings and concerns regarding the quality of life are also born out in the area of rent renegotiation. Evidence concerning the Tract A lessees and those in Hawaii Kai, clearly demonstrates that the increased lease rents proposed by Bishop Estate, by taking a larger portion of a family's budget and leaving less for the family's other necessities, will have an impact on the quality of life of that family. The new lease rents will not leave a sufficient amount in the family's budget deemed reasonable enough to pay for other necessary expenses of life. (Hillendahl: 5/24-26/83; Mak: 5/31-6/1/83)

## V. The HHA Administers Various Programs Under Its Legislative Mandate

120. The HHA administers a low-rent housing program under H.R.S. Chapter 359 which is the State's equivalent of the federal rental program. This is a month-to-month rental program with rents increasing or decreasing based upon a person's income. (Tr. Vol. III, p. 18)

121. The HHA administers the teacher housing program under H.R.S. Chapter 359G which assists in providing rentals for teachers in rural communities. (Tr. Vol. III, p. 20)

122. The HHA administers the housing program under the Omnibus Housing Act, H.R.S. Chapter 359G. This housing program is all encompassing, including fee simple, leasehold, rental, single family and multi-family housing. (Tr. Vol. III, p. 21.)

123. The HHA administers the housing program which assists displaced persons under H.R.S. Chapter 111. (Tr. Vol. III, p. 21.)

124. The HHA manages a total of over 7,500 housing units funded by the federal and state government. (Exh. 223)

125. The HHA also provides low and moderate income families with rent subsidies through two major programs: the HUD Section 8 Program and the State Supplemental Program. (Exh. 223)

126. The HHA also provides housing finance assistance through its Hula Mae program, which provides low interest

mortgages to the first time homeowner, and through its Construction Loan Note program which provides HHA with an alternative source of below-market interest rate funds to finance the construction of multi-family public housing projects. (Exh. 223)

127. Since 1974, when the first petitions for designation were filed with the HHA by lessee groups, thirty-three development tracts comprised of 6,355 lots have been "converted" to fee simple after petitions had been filed. These conversions were voluntarily negotiated sales between the lessors and lessees. In some cases settlements were reached after Chapter 516 eminent domain complaints had been filed, and in others, after designation for condemnation by the HHA. As of March 28, 1983, the lessees of 52 development tracts had filed petitions with the HHA but no conversion had yet taken place. These 52 development tracts contained 7,186 lots leased to lessees participating in the petition. The number of lots leased by non participating lessees was 8,469 bringing the total number of lots potentially in conversion to 15,655. Therefore, the total number of lots in tracts involved in the land reform program under Chapter 516 as of this writing is 22,010. (Tr. Vol. IV, p. 10-15, Exh. 226a-g, Exh. L-5.)

#### VI. The Bishop Estate: Land Holdings and Policies

128. The Bishop Estate, the largest single private landowner on Oahu, has been deemed a tax-exempt educational trust by the United States Internal Revenue Service and its sole beneficiary is the Kamehameha Schools. Except for income derived from its wholly owned subsidiaries, the

Kamehameha Investment Corporation and the Royal Hawaiian Shopping Center, the income generated by its landholdings is not subject to tax and is used to administer the Estate and to operate and maintain the Kamehameha Schools.

#### A. Land Holdings

129. As of July, 1982, the Bishop Estate's land holdings totaled approximately 341,500 acres distributed over the five main Hawaiian islands as follows:

	<u>Acres</u>	<u>Percentage of Total Area</u>
Oahu .....	56,128	15.04%
Maui .....	2,526	.54%
Molokai .....	4,695	2.79%
Hawaii .....	266,438	10.57%
Kauai .....	11,725	3.28%

(Exh. T-15)

130. About 2.59 percent of the total land holdings of the Bishop Estate (in acres) produce approximately 89.27 percent of the lease rent income of its land holdings. (Exh. T-15.)

131. The Bishop Estate's residential leasehold land comprises 2.42 percent of the Bishop Estate's total land holdings and produces 25.17 percent of its lease rent income. (Exh. T-15.)

132. The Bishop Estate's commercial land holdings comprise 0.17 percent of the Bishop Estate's total land holdings and produce 64.10 percent of its lease rent income. (Exh. T-15.)



133. Bishop Estate's land is classified and produces income as follows:

<u>Land Classification</u>	<u>Percentage of Bishop Estate's Land</u>	<u>Percentage of Lease Rent Income</u>
Commercial 591 acres .....	0.17%	64.10%
Residential 8,267 acres .....	2.42%	25.17%
Agricultural 165,191 acres ...	48.37%	10.73% (both agricul- tural and conserva- tion
Conservation 167,463 acres .	49.04%	

(Exh. T-15)

134. The tax assessed value of the Bishop Estate's land (including the lessees' interest in the value of land) is \$2,316,410,000. (Exh. T-15)

135. The Bishop Estate is the largest private landowner on Oahu. Its 56,513 acres on Oahu constitute 15.1 percent of all land on Oahu and 22.7 percent of all privately held land on Oahu as of 1978. Of the land on Oahu designated for residential use, the Bishop Estate's 4,881 acres constitute 19.6 percent. The Bishop Estate has 2,594 acres, or 24.4 percent of the land classified as unimproved residential on Oahu. (Exh. L-104)

## B. Land Policies

### 1. Incremental Development

136. In the development of its residential lands in the urban corridors of Oahu, the Bishop Estate and its developers used an incremental, or stepwise approach, building only a limited number of units for sale on the market each year over many years.

137. In Heeia, a suburban development in Honolulu County built on Bishop Estate land, the developer mar-

keted only a limited number of housing units in any given year, although he had City and County approval to develop the entire area at one time. (Tr. Vol. XXII, p. 26-30.) (Ex. L-109)

138. Incremental development has been the pattern from 1963 to the present in Pearl Harbor Heights, Halawa Hills, Pearl Ridge, Enchanted Hills, (the Halawa to Waiawa area), all situated on Bishop Estate land in western urban Honolulu and leased and developed by AMFAC-Pearl Harbor Heights Developers (later Lear-Seigler).

139. In Hawaii Kai, an incremental approach has been used since 1963 by the developer of this Bishop Estate land. (Ex. L108)

140. Incremental development takes into account the number of possible buyers for houses and keeps the supply of houses on the market proportionately reduced with the purpose of stabilizing prices and guaranteeing maximum profits to the developer. (Tr. Vol. XXII, p. 54-64) (Ex. L-111)

141. The elimination of the leasehold system, or minimizing its effect, would create a freer market in land, less subject to the monopolistic and oligapolistic powers of the few landowners/developers who control the Honolulu suburban lands so that the price of land is not set by artificial barriers but by the open market.

## 2. Lease Rents

142. Rental policy for the Bishop Estate leaseholds is established by the Trustees. The Trustees can unilaterally change rent renegotiation policy at any time.

143. Initial lease rents in new subdivisions constructed on Bishop Estate lands are based on "marketability" and other factors determined by the developers and the Trustees to make the homes on the lots saleable and not on the formulas set by the Trustees for extension or renegotiation. New lease rents in new development tracts are based on a return considerably lower than the mortgage interest rates so that the homes thereon will be competitive with fee simple property. However, once the lots are leased and the houses on them sold, the Bishop Estate is no longer constrained in its demand for rent by earlier considerations of marketability. (Exh. L-37)

144. At rent renegotiation, the actual amount of rent charged by the Bishop Estate is a percentage of the appraised value of the individual houselots. Therefore, as the value of the individual lots increases as the lessees improve the property on which they live and the community as a whole, the lease rent increases. The lessees pay for the onsite and offsite improvements, either directly or through taxes. The Bishop Estate, however, which contributes nothing to the appreciation of the lots, except for the raw land, ultimately benefits from the lessees' expenditures in money and effort, through its prerogative to charge higher lease rents based on these improvements.

145. In May 1960, when no significant lot development charge was paid by the lessee, the Trustees adopted the policy of quoting rents for lease extension or renegotiation at 3 percent of the full market value of the improved lot, with no credit to the lessee for offsite improvements or lot development costs actually paid for by the lessee.

146. A chart attached to the Bishop Estate staff report dated January 23, 1968, graphically demonstrated the advantage to the Bishop Estate of requiring the lessee to pay for offsite improvements and lot development costs. The Trustees were later able to charge higher rents based on the appreciation of the lot caused by the offsite and onsite improvements, all of which were paid for by the individual lessee. (Exh. L-36)

147. In 1962, the Trustees adopted a policy giving lessees credit for 75 percent of the remaining fixed rent when they extended or renegotiated their lease rent early. The Bishop Estate staff considered this rental credit an important stimulus to frequent renegotiation of lease rent. Since renegotiation is the most significant factor in increasing revenue for the Trustees, it was important that Bishop Estate encourage early renegotiation of rent.

148. On October 5, 1965, the Trustees for the first time adopted a policy of giving the lessee some credit for offsite improvements and lot development costs, by crediting the lessee with the original cost of such improvements amortized over 55 years.

149. In 1968, the Bishop Estate staff stated in a report to the Trustees that if condemnation action under the Land Reform Act were initiated, it would be important for the Bishop Estate to have the highest possible lease rents in effect. (Exh. L-37)

150. In 1968, the Bishop Estate began to examine its leasing policy with the eventual objection of increasing the income to the Estate. For assistance, the staff conferred with representatives of some of the other large landowners,

the Kaneohe Ranch and the Campbell Estate, and considered their respective policies regarding renegotiation. In a report dated September 19, 1968, the staff recommended that rents quoted on lease extensions or renegotiation be increased from 3 percent to 3.6 percent or to a maximum of 4 percent of the appraised value of the individual house-lots. The staff observed that major changes in the lease rent policy of a major landowner like the Bishop Estate, such as an increase of more than 4 percent, could have serious consequences for the state economy, could disrupt property values, and would arouse public indignation. The staff further concluded that a substantial increase in rents demanded at renegotiation would not only cause a loss in the market value of leasehold properties but would motivate lessees to seek to purchase their residential lots under the Land Reform Act. (Exh. L-37)

151. Despite these recommendations, the Trustees voted at a meeting held on September 24, 1968 to increase the lease rent rate to be quoted on lease extension or renegotiation from 3 percent to 4.28 percent for 30-year fixed rent leases. (Exh. L-37)

152. In 1969, the Trustees commissioned reports from independent consultants regarding their residential leasehold rent policy. Economic Research Associates (hereinafter referred to as "ERA"), a mainland company, submitted a report to the Trustees dated September 10, 1969, which recommended that in setting renegotiated lease rent, the lessees be given credit for a proportionate share of the appreciated value of the lot based upon the initial ratio of offsite improvements and lot development costs to the unimproved lot value at the inception of the lease.

ERA further recommended that the initial market value of the raw land be used as a base for setting lease rents throughout the duration of the lease. ERA also recommended not using a rate in excess of 4.28 percent in setting lease rents upon renegotiation. (Exh. L-38, 39, 51)

153. In a staff report dated March 12, 1970, the Bishop Estate staff stated that the 4.28 percent return adopted in 1968 was a rather arbitrary figure and recommended to the Trustees that it be rounded down to 4 percent or up to 4.5 percent (Exh. L-39)

154. In that report dated March 12, 1970, the Bishop Estate staff, after careful consideration, developed a proposal which would give the lessee full credit for his lot development costs paid for by him, and for a 2 percent appreciation per year on the cost of those improvements. The staff also recommended a 100 percent rental credit for the remaining fixed rent on leases with a 30-year fixed rent period. In consideration of these two credits to the lessee, the Bishop Estate staff recommended that the annual lease rental rate be rounded up to 4.5 percent. (Exh. L-39)

155. On January 5, 1971, the Trustees rejected the staff recommendations that the lessee be given credit for the cost of offsite improvements and lot development costs paid for by him with appreciation at 2 percent per year and 100 percent rental credit for the remaining fixed term, but increased the annual lease rental rate from 4.28 percent to 4.5 percent. The 4.5 percent rental rate was still the annual rental rate in effect under the Trustees' policy which was challenged in *Midkiff v. Amemiya*, Civil No.

47103, Circuit Court of the First Circuit, State of Hawaii (1978). (Exh. L-45)

156. On July 24, 1973, the Trustees adopted a new policy for lease extensions which provided for a new term of 55 years with rental fixed for the first 25 years; annual rents based on a 4 percent rate for the first 15 years; a a 50 per cent step-up for the following 10 years; and the provision that rent for the next 10 years should not exceed the rent for the fifteenth year of the new lease term, increased in the same proportion as any net increases in the Honolulu Consumer Price Index over the 15-year period. (Exh. L-48)

157. On July 24, 1973, the Trustees adopted a policy requiring lessees to pay \$50 to obtain a firm commitment from the Bishop Estate stating the new rent offered for extension of their lease. The quotations did not require any actual appraisals except in special cases and were simply based on computations using a multiplier of tax assessed values. The lessees had to pay the \$50 in advance even if they would not accept the rent quoted by Bishop Estate. (Exh. L-48)

158. In the Bishop Estate Staff Report of May 6, 1976, the staff reported that the rapid increase in lease rent had provided considerable public opposition, and even animosity, and, for some retired persons, real hardships had been reported. The staff recommended that it therefore appeared appropriate to quote lower rents in the early years of the lease and then charge greater rent in the later years. (Exh. L-42)

159. In their May 6, 1976 meeting, the Trustees of Bishop Estate voted to (1) immediately suspend quota-



tions of rents for requested extensions of any residential leases until further notice; and (2) instruct the staff to immediately cancel any overdue or outstanding offers for residential lease extensions. (Exh. L-42)

### 3. Land Sales and Leasing

160. From 1918 to June 23, 1967, a total of 7,518 single family residential leasehold lots were developed on Bishop Estate land from June 24, 1967 to June 1, 1975, 5,734, from June 2, 1975 to the date of this trial, 1,096, for a total of 14,348 leasehold lots developed on Bishop Estate land. (Exh. T-81)

161. From 1910 to 1949, the Bishop Estate sold approximately 328 residential houselots in fee simple to individual buyers. (Exh. T-80)

162. From 1950 to 1966, the Bishop Estate sold approximately 1,048 residential houselots in fee simple to individual buyers (Exh. T-80, L-10)

163. From 1967 to 1975, the Bishop Estate sold only 358 of its 12,591 existing leasehold single family residential properties in fee to its lessees or to someone else. (Exh. T-80, T-81)

164. One of the Bishop Estate's primary objections to the land reform legislation enacted or proposed since 1955 has been the possible adverse tax consequences the Bishop Estate would suffer as a "dealer in real estate" if it were forced to sell its fee simple interest in land in a manner unacceptable to the IRS. This designation would make almost all Bishop Estate income taxable. To maintain its tax exempt status, the Bishop Estate, in 1967, supported

the condemnation approach of Act 307 through which it could avoid classification by the Internal Revenue Service as a dealer in real estate. The Bishop Estate later sought and obtained from the Internal Revenue Service approval to sell the leased-fee interest in its single family residential properties without being taxed and used as justification for its request the existence of HRS Chapter 516 and the intent of the HHA to use that law. (Exh. L-53) The letter containing the IRS approval stated in part:

The limitation on your sales activity to your present lessees, the operation of the state law procedure encouraging and requiring the sale of leasehold estates and the absence of promotional and development activity indicate that your sales are not of stock and trade or the property held for sale to customers in the ordinary course of a trade or business.

Therefore, we rule that the sales will not affect your exempt status. The sales are within the section 512(b) (5) modification and gains from the sales will not be unrelated business taxable income to your organization under sections 511 and 512 of the Code.

165. After the enactment of the Land Reform Act, the Bishop Estate sold 2,516 residential houselots in fee simple to individual buyers and of those, 2,166 were sold directly to the lessees as negotiated sales under the Land Reform Act. This supports the conclusion that the Land Reform Act has been an important, if not the sole, motivation in most of the Bishop Estate's sales of its fee simple residential houselots.

## VII. Kamiloiki Development Tract

166. Kamiloiki is a single family leasehold residential subdivision located in Hawaii Kai, a suburban neighborhood, predominantly single-family, located in Eastern Honolulu in the "urban corridor" of Honolulu, and, therefore, was the type of area which the Legislature in 1967 contemplated would be afflicted with the problems associated with the concentration of landownership and the residential leasehold system.

167. Donna Ikeda, a Defendant Lessee, spent part of her childhood in Kamiloiki while it was still a rural area. At that time dirt roads lead to the various farms, there was no school closer than Kaimuki, and even the school bus stop was miles from the childrens' homes. When the area was developed, she was one of the first to purchase a home. She and the other lessees saw to and financed the planting of trees, grass, shrubs, the building of an elementary school; and the establishment of parks, all of which has enhanced the neighborhood.

168. Kamiloiki and a considerable portion of the residential land in Hawaii Kai is owned by the Bishop Estate and leased to the homeowners under long-term residential leases, and is part and parcel of the concentration of landownership referred to by the Legislature (Exh. T-81, T-83, T-103, T-104a)

169. The leases provided by the Bishop Estate in Kamiloiki are for terms of 55 years with the rent fixed for either the first 30 or 40 years. The original lease forms used were FHA 2372 H. The lease rent for this initial fixed period is usually \$155 per year. The first leases in Kamiloiki were executed around 1970. (Exh. T-83, T-86) These leases were

of the type which the Legislature in 1967 contemplated would subject the lessees to the type of problems associated with the residential leasehold system.

#### VIII. The Condemnation in Kamiloiki

170. On October 17, 1980, January 23, 1981 and February 27, 1981, the HHA designated, pursuant to HRS § 516-83, the development tract known as "Kamiloiki", for condemnation. (Tr: Vol. I, p. 45-70.)

171. Under HRS Section 516-22, the HHA has the authority to designate and condemn an entire development tract where the following conditions are met: twenty-five or more lessees or the lessees of more than fifty percent of the residential lots within the development tract, whichever number is less, have applied for purchase pursuant to HRS § 516-33; proper notice of public hearings has been given; a public hearing has been held; and the HHA finds that the acquisition of the leased fee interest in the residential houselots in the development tract through the exercise of the power of eminent domain or purchase under threat of eminent domain will effectuate the public purposes of Chapter 516.

172. It is not necessary that the lessee of a particular residential houselot in the development tract apply to the HHA for purchase under Chapter 516 in order for the HHA to be able to designate that houselot within the development tract designated for condemnation. (Tr. Vol. II, p. 4-5)

173. Upon receiving the Request for Designation of Development Tract with thirty (30) signatures and thirty

(30) Applications to Purchase Leased Fee Interest Under H.R.S. Chapter 516, and the Request to Schedule A Public Hearing, dated November 9, 1978 (Exh. 8) and received by the Hawaii Housing Authority on November 15, 1978, from the Kamiloiki Valley Community Association attorney, the Land Reform Branch of the HHA reviewed the Request for Designation to determine whether the tract qualified.

174. After reviewing the Request and the documents submitted, the Land Reform Branch made a favorable preliminary determination upon the feasibility of designation (Exh. 37) and recommended adoption of Resolution No. 1717, The Resolution for Proposed Designation of Kamiloiki Valley Subdivision. (Exh. 38)

175. On January 18, 1979, the HHA commissioners adopted Resolution No. 1717, "Resolution for Proposed Designation of the Kamiloiki Valley Subdivision." (Exh. 39)

176. Resolution 1717 was published in the Honolulu Star-Bulletin three (3) times, on February 10, 12 and 13, 1979 (Exh. 40), and subsequently republished for correction of the dates of the notices of public hearing in the Honolulu Star-Bulletin two (2) times, on February 14 and 15, 1979. (Exh. 41)

177. At the public hearing held on February 22, 1979, 8:30 p.m. at Kaiser High School Cafetorium, 511 Lunalilo Home Road, William A. Hall, Assistant Executive Director of the Hawaii Housing Authority, presided, calling the hearing to order, hearing all testimony, and asking for a show of hands of those persons for and against designation of the tract. (Exh. 42)

178. All persons present and voting at the public hearing voted unanimously in favor of the designation of the tract. (Exh. 42)

179. On March 30, 1979, the Land Reform Branch prepared a summary of the findings of the public hearing and a recommendation that Hawaii Housing Authority Commissioners adopt Resolution No. 1764, which provides for "The Finding of Effectuation of Public Purpose of Chapter 516, HRS, And A Request To The Lessor And Lessee To Negotiate The Owners' Basis." (Exh. 43)

180. On March 30, 1979, the Commissioners met and approved and adopted Resolution No. 1764, "The Finding of Effectuation of Public Purposes of Chapter 516, HRS, and Request for Negotiation". (Exh. 44)

181. On April 10, and 25, 1979, the HHA mailed a copy of Resolution No. 1764 to the Kamiloiki Valley Community Association's attorneys (Exh. 45 and 46) and the Trustees of the Bishop Estate (Exh. 47 and 48), and also requested the parties to begin negotiating the just compensation to be paid for the leased fee interest.

182. The sixty (60) day period for negotiations expired on June 25, 1979.

183. On June 2, 1980, at 6:30 p.m., the Commissioners of the Hawaii Housing Authority met in a recessed meeting in the office of Authority to discuss the Request to Set Commitment Amounts for Kamiloiki Valley. (Exh. 49)

184. At the June 2, 1980 Commission Meeting, the commitment amount for Kamiloiki Valley was set at 120 percent of the MAI appraisal, plus 1 percent per month over 6 months. (See page number 89 of Exh. 49)

185. On August 1, 1980, the Hawaii Housing Authority mailed to each applicant a request for the following materials: (1) a current financial statement, (2) evidence of financial ability to purchase at the commitment amount, and (3) a \$500 deposit. (Exh. 51)

186. On August 4, 1980, title reports were ordered from Long and Melone by the Land Reform Branch for all lots of the applicants. (Exh. 51)

187. On August 18, 1980, the Land Reform Branch mailed Discrepancy List Number 1 to the Kamiloiki Valley Community Association wherein were the comments of the Land Reform Branch on the qualification of each lessee noted in Tax Map Key Number order. (Exh. 52) The Discrepancy List indicated which lessee did not, at that particular time, meet a particular requirement.

188. On September 5, 1980 (Exh. 57) and October 8, 1980 (Exh. 58), the Hawaii Housing Authority opened individual passbook savings accounts of \$500 each at State Savings for the two hundred fifty-eight (258) applying lessees who had submitted this amount to the Land Reform Branch.

189. On September 9, 1980, the Land Reform Branch mailed Discrepancy List Number 2 to the Kamiloiki Valley Community Association. (Exh. 53)

190. On September 23, 1980, the Land Reform Branch mailed Discrepancy List Number 3 to the Kamiloiki Valley Community Association. (Exh. 54)

191. On September 29, 1980, the Land Reform Branch mailed Discrepancy List Number 4 to the Kamiloiki Valley Community Association. (Exh. 55)



192. On October 9, 1980, the Land Reform Branch mailed a list of the tax map keys of applicants who did not qualify for designation. (Exh. 56)

193. On October 17, 1980, the Land Reform Branch prepared "For Action Item No. 23" for consideration by the Commissioners along with Resolution No. 1933, the Designation Resolution for the two hundred fifty-four (254) leased residential lots in the Kamiloiki Valley Subdivision. (Exh. 57)

194. In "For Action Item No. 23" the Land Reform Branch reported to the commissioners the following:

1. In accordance with the Land Reform Act, two hundred fifty-four (254) lessees of the Kamiloiki Valley Subdivision situated at Hawaii-Kai, City and County of Honolulu, have applied for designation and purchase of the leased fee interest in their lots from Bishop Estate as the fee owner, lessor and legal or equitable owner in said lots. These lessees have complied with all the requirements of Rule 10.

2. At the public hearing held on February 22, 1979, all but one testimony presented were in favor of the proposed designation.

3. Although the sixty (60) day period for negotiation expired on June 25, 1979, the lessees' representative (Hoddick, Reinwald, O'Connor & Marrack) and the Trustees' representative (Ashford & Wriston) have not been able to reach agreement as to the owner's basis.

4. The Designation Resolution identifies the specific lots which the Authority wants to acquire. The Resolution also sets the date of compensation and starts the

time period for which HHA is liable for the lessor's expenses such as attorneys' fees if the Authority does not acquire or file condemnation within twelve (12) months from the date of said Resolution.

5. It is anticipated that the condemnation suit (which Judge King allowed in his preliminary ruling and memorandum decision) will be filed as soon as possible after adoption of the Resolution.

6. Based upon the financial statements, loan commitments and/or verifications of funds on file, the two hundred fifty-four (254) lessees have submitted satisfactory proof of ability to purchase the leased fee interest in their respective residential lots. Additionally, \$500 was previously collected from said lessees.

7. The applicants listed on the attached exhibit have not qualified.

195. Also in "For Action Item No. 23" the Land Reform Branch recommended (1) adoption of Resolution No. 1933 pertaining to the Designation of qualified lots in Kamiloiki Valley Subdivision and the commencement by the Authority's attorney of legal proceedings to acquire the leased fee interest, (2) approval of the acquisition of the designated lots and the subsequent disposition thereof, and (3) authorization for the Executive Director or his designee to send written notification to the applicants who have not qualified to purchase.

196. There are two periods of time in which the HHA determines that a lessee meets the qualifications as set out in H.R.S. § 516-33: at the designation of the development tract and at transfer of title from the HHA to the lessee. (Tr. Vol. II, p. 35.)

197. The Commission approved Resolution No. 1933 on October 17, 1980 (Exh. 59) designating Kamiloiki for condemnation, which was published in the Honolulu Star-Bulletin on October 24, 1980. The Complaint herein was filed on November 10, 1980.

198. Although the evidence shows that in reviewing and processing the Defendant Lessees' applications to purchase the leased fee interest in their residential houselots and their requests for designation, the HHA sometimes may have been deficient in following its own procedures, in that it found eligible a few lessees who might not have been eligible, the HHA properly found that most of the lessee-applicants fell within the class intended by the legislature to benefit from the application of Chapter 516.

199. The HHA's action in designating the Kamiloiki development tract for condemnation was proper.

200. The HHA properly found that the acquisition of the leased fee interest in the residential houselots in Kamiloiki through the exercise of eminent domain or by purchase under the threat of eminent domain and the disposition thereof would effectuate the public purposes of Chapter 516 and was therefore a public use. (Tr. Vol. I, pp. 45-70, Exh. 43)

### Conclusions of Law

#### A. The Presumption of Constitutionality of Legislative Enactment

1. Every enactment of the legislature is presumptively constitutional and the burden of showing that an act of the legislature is unconstitutional is on the party asserting

that the law is unconstitutional. *Bishop v. Mahiko*, 35 Haw. 608 (1940), *State of Hawaii v. Raitz*, 63 Haw. 64,621 P.2d 352 (1980).

2. Every enactment of the legislature carries a presumption of constitutional validity and should be sustained by a reviewing court unless the statute has been shown to be beyond all reasonable doubt in violation of the constitution. *Bishop v. Mahiko*, 35 Haw. 608 (1940); *State of Hawaii v. Raitz*, 63 Haw. 64,621 P.2d 352 (1980).

3. The party challenging the constitutionality of a statute must present and adduce facts to show the unconstitutionality of the statute by clear and convincing evidence and must show beyond all question that the legislature exceeded the limits established by the constitution. *Bishop v. Mahiko*, 35 Haw. 608 (1940).

#### B. The Determination and Declaration of "Public Use"

4. The right to declare what shall be deemed a "public use" is vested in the legislature and the question for determination is whether the legislature might reasonably have considered the use for which the eminent domain power is exercised was public, not whether the use is public in fact. *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952).

5. The determination of "public use" is primarily vested in the legislature and is predicated upon the presumption that a use of the property is public, if the legislature has declared such use to be a "public use." *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952).

6. Legislative findings and declarations of "public use" are entitled to great weight and a legislative finding and

declaration that the particular uses described in the statute are a "public use" are entitled not only to respect, but are prima facie correct and valid. *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952).

7. The issue of public use is a judicial question and one of law to be decided on the facts. Where the legislature declares a particular use for the condemned property to be a "public use," the presumption is in favor the legislative declaration and will be binding upon a reviewing court, unless such use is clearly and palpably of a private character. *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952).

8. Great weight is accorded the legislative finding of "public use" in a statutory exercise of eminent domain and the prima facie acceptance of its correctness will not be lightly disturbed and a court will not overrule a legislative determination of "public use" unless it is manifestly wrong. *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952).

9. The state legislature declared that Act 307, 1967 Session Laws ("Act 307"), Act 184, 1975 Session Laws ("Act 184") and Act 186, 1975 Session Laws ("Act 186") were enacted and would accomplish a "public use" insofar as they would address and attempt to rectify the problems of the concentration of land ownership; the shortage of single-family residential fee simple property; the restriction on the people of a real choice between fee simple and leasehold residential property, which has in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated, and has enabled lessors

to include in residential leases terms and conditions which are financially disadvantageous to the lessees and which unduly restrict their freedom to enjoy their leasehold estates; the predominance of the policy of leasehold development over fee simple; rent renegotiations; the effect the leasehold system on the public welfare and on the economy of the State; and would eventually result in the elimination of the leasehold system in Hawaii.

10. Act 307, Act 184, and Act 186 declared that a "public use" would be achieved and realized through the exercise of the eminent domain power resulting in the dispersion of fee simple residential lots to as large a number of people as possible; the availability of fee simple residential lots at a fair and reasonable price; and the opportunity for lessees of residential leases to derive full enjoyment from their leaseholds. All of these are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

11. The legislative exercise of the eminent domain power to improve the general economic conditions of the state, even though identifiable individual private parties may be specially benefitted, is a "public use" of the property taken. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *Mayor and City Council of Baltimore v. Chertkoff*, 441 A.2d 1044 (Md. 1982).

12. The state legislative declaration in Act 307, 1967 Hawaii Session Laws, that the statute was enacted to and would accomplish a "public use" through the dispersal of the ownership of fee simple lands and the promotion of the general prosperity of the state is a legislative finding

and declaration of "public use" and is prima facie correct and binding upon a reviewing court, unless such legislatively-declared use is clearly and palpably of a private character without any public benefits.

13. The constitutional requirement of "public use" is established by the presumption in favor of constitutionality, and the failure of the Bishop Estate to overcome that presumption of constitutionality affirms the legislature's findings and declarations that Chapter 516, Hawaii Revised Statutes ("Chapter 516") achieves and is for a "public use."

14. The legislative finding and declaration of "public use" incorporated in Chapter 516, Act 307, 1967 and Act 184, 1975 are supported by the evidence and are valid.

C. The Designation of the Kamiloiki Tract Pursuant to Chapter 516

15. The exercise of the condemnation power for the Kamiloiki Tract is an exercise of the condemnation power contemplated by Chapter 516.

16. The selection and designation of any particular tract of leasehold land, including the Kamiloiki Tract, for condemnation is delegated to the Hawaii Housing Authority, provided that the Hawaii Housing Authority finds that the designation would "effectuate the public purposes" of Chapter 516.

17. - Hawaii Housing Authority so found that the designation of the Kamiloiki Tract would "effectuate the public purposes" of Chapter 516 and that finding has been established to be proper and valid, notwithstanding some possible procedural deficiencies on the part of the HHA.



#### D. Evidence

18. The Court concludes from the legislative findings and declarations and the evidence presented in this case that Chapter 516, Hawaii Revised Statutes, was enacted for a "public use and purpose" and that the condemnation provided therein are for a "public use and purpose" and those legislative findings are supported by a presumption of constitutionality which must be negated by clear and convincing evidence beyond all reasonable doubt.

19. The Trustees of the Bishop Estate, have failed to adduce by a preponderance of the evidence, no less than by clear and convincing evidence or beyond a reasonable doubt, that Chapter 516, was unconstitutional under the United States Constitution and the constitution of the State of Hawaii.

20. The Trustees of the Bishop Estate have failed to establish by a preponderance of the evidence, no less than by clear and convincing evidence or beyond a reasonable doubt, that the legislative findings and declaration of "public use" set forth in Act 307, Act 184, and Act 186, is erroneous and without any support or is of a private character without any public benefits.

21. The Trustees of the Bishop Estate have failed to prove that Chapter 516, is arbitrary, capricious and not reasonably related to a proper legislative purpose.

22. Even when examining Chapter 516 and its justifications under a standard of "heightened scrutiny," Chapter 516 is constitutional when measured against the specific constitutional limitations of due process, equal protection and the "public use" requirement.

24. Chapter 516 does not take property without just compensation in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

25. Chapter 516 is a legitimate exercise of the sovereign police power and is constitutional.

26. This Court shall enter a judgment that Act 307, Hawaii Session Laws of 1967, codified as Chapter 516, Hawaii Revised Statutes as now amended is constitutional under both the Hawaii State and United States Constitutions.

Dated: Honolulu, Hawaii, September 2, 1983.

[Seal]

Ronald B. Greig  
Judge of the above-entitled court

## APPENDIX "A"

### Documents Before the Legislature

The following documents, studies and reports were available to and/or before the legislature in 1967 and 1975, or contain supporting evidence for the following legislative findings of Act 186:

#### *Section 1(a)(1):*

AN INVENTORY OF AVAILABLE INFORMATION ON LAND USE IN HAWAII (Volume 1: Evaluation and Recommendations) (01/57) Prepared for the Economic Planning and Coordination Authority, Territory of Hawaii, Harland Bartholomew and Associates (Exhibit 155)

AN INVENTORY OF AVAILABLE INFORMATION ON LAND USE IN HAWAII (Volume 2: Annotated Bibliography and Summary of Interviews) (1957) Prepared for the Economic Planning & Coordination Authority by Harland Vartholomew and Associates (Exhibit 158)

A STUDY OF LARGE LAND OWNERS IN HAWAII (1957) Clinton T. Tanimura and Robert M. Kamins, Report No. 2, 1957, Legislative Reference Bureau, University of Hawaii. (Exhibit 156)

MAJOR LANDHOLDINGS IN HAWAII, OWNER-SHIP PATTERNS AND LEASING POLICIES (02/57) Economic Planning and Coordination Authority (EPCA) Staff Report No. 14. (Exhibit 157)

MAJOR LANDHOLDINGS IN HAWAII DATA ON LAND OWNERSHIP AND LAND USE (1961) Legisla-

tive Reference Bureau, University of Hawaii, Honolulu, Hawaii, Request No. 7969. (Exhibit 164)

AN ECONOMIC VIEW OF LEASEHOLD AND FEE SIMPLE TENURE OF RESIDENTIAL LAND IN HAWAII (1964) Louis A. Vargha, Land Study Bureau, University of Hawaii, L.S.B. Bulletin No. 4. (Exhibit 169a)

PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS (1967) Robert H. Horwitz, Judith B. Finn, Assisted by Marie Gillespie, Karen T. Uemoto, University of Hawaii, Report No. 3, 1967, Reprinted 1969, Legislative Reference Bureau, University of Hawaii. (Exhibit 176)

HOUSING COSTS IN HAWAII—Report to the Legislature of the State of Hawaii (1969) Submitted by the Interim Committee on Housing, Prepared by the Office of the Lieutenant Governor. (Exhibit 177)

THE STATE OF HAWAII DATA BOOK (1975)

Department of Planning & Economic Development, prepared in the Research and Economic Analysis-Division, headed by Dr. Richard Y. P. Joun, Robert C. Schmitt, State Statistician, with the assistance of Lynn Y. S. Zane, Research Statistician (Exhibit 202)

HAWAII LAND STUDY—STUDY OF LAND TENURE, LAND COST, AND FUTURE LAND USE IN HAWAII (04/25/69)

E.R.A. Economics Research Associates, Los Angeles, Washington, D.C. (Exhibit 178)

**RESIDENTIAL LEASEHOLD SUBDIVISIONS  
ISLAND OF OAHU (1963)**

Louis A. Vargha, University of Hawaii, Land Study Bureau, Special Study Series, ISB Report No. 7 (Exhibit 168a)

*Section 1(a)(2)*

**AN INVENTORY OF AVAILABLE INFORMATION  
ON LAND USE IN HAWAII (Volume 1: Evaluation  
and Recommendations) (01/57)**

Prepared for the Economic Planning and Coordination Authority, Territory of Hawaii, Harland Bartholomew and Associates (Exhibit 155)

**LAND AND HOUSING ON OAHU (04-1959)**

Prepared by Land Study Committee of the Honolulu Chamber of Commerce. (Exhibit 160)

**URBAN DEVELOPMENT ON OAHU, 1946-1962 (1964)**

Louis A. Vargha, Assoc. Researcher, Urban Economics, University of Hawaii (Exhibit 165)

**RESIDENTIAL LEASEHOLD SUBDIVISIONS  
ISLAND OF OAHU (1963)**

Louis A. Vargha, University of Hawaii, Land Study Bureau, Special Study Series, ISB Report No. 7 (Exhibit 168a)

**AN ECONOMIC VIEW OF LEASEHOLD AND FEE  
SIMPLE TENURE OF RESIDENTIAL LAND IN  
HAWAII (1964)**

Louis A. Vargha, Land Study Bureau, University of Hawaii, L.S.B. Bulletin No. 4 (Exhibit 169a)

**HOUSING COSTS IN HAWAII—Report to the Legislature of the State of Hawaii (1969)**

Submitted by the Interim Committee on Housing, Prepared by the Office of the Lieutenant Governor (Exhibit 177)

**GOVERNOR'S STATEWIDE CONFERENCE ON HOUSING: Selected Papers From The Oahu Session (1970)**

Office of the Governor, Department of Planning and Economic Development, State of Hawaii (Exhibit 183)

**HOUSING IN HAWAII: PROBLEMS, NEEDS AND PLANS (1970)**

Prepared for the State of Hawaii, Dept. of Planning and Economic Development by Marshall Kaplan, Gans, Kahn and Yamamoto (Exhibit 185)

**STATE OF HAWAII LAND USE DISTRICTS & REGULATIONS REVIEW, WORKING PAPER #1 (1969)**

Eckbo, Dean, Austin & Williams, January 8, 1969 (Exhibit 182)

**HOUSING FOR HAWAII'S PEOPLE—Summary Report (1977)**

Prepared for the State of Hawaii, Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 207)

**LAND USE DISTRICTS FOR THE STATE OF HAWAII, Recommendations for Implementation of the State Land Use Law, Act 187, SLH 1961 (1961)**

Prepared for the Dept. of Planning and Research and the Land Use Commission by Harland Bartholomew & Associates (Exhibit 167)

**CENTRAL OAHU PLANNING STUDY Technical Supplement 3: A Survey of Vacant Residential Lands Within the Honolulu Commutershed, (January 1973)**

John C. Holstrom, Principal Investigator, Central Oahu Planning Study, Vacant Land Study Component, Published by the Dept. of Planning & Economic Development. (Exhibit 191)

**CENTRAL OAHU PLANNING STUDY—A PROGRESS REPORT (1972)**

Prepared for Presentation to the Sixth Legislature, State of Hawaii, Regular Session of 1972, Department of Planning and Economic Development, February 1972

*Section 1(a)(3)*

**MAJOR LANDHOLDINGS IN HAWAII, OWNERSHIP PATTERNS AND LEASING POLICIES (02/57)**

Economic Planning and Coordination Authority (EPCA) Staff Report No. 14 (Exhibit 157)

**LAND AND HOUSING ON OAHU (04/1959)**

Prepared by Land Study Committee (Exhibit 160)

**MAJOR LANDHOLDINGS IN HAWAII**

**DATA ON LAND OWNERSHIP AND LAND USE (1961)**

Legislative Reference Bureau, University of Hawaii, Honolulu, Hawaii, Request No. 7969. (Exhibit 164)



**RESIDENTIAL LEASEHOLD SUBDIVISIONS  
ISLAND OF OAHU (1963)**

Louis A. Vargha, University of Hawaii, Land Study Bureau, Special Study Series, LSB Report No. 7 (Exhibit 168a)

**AN ECONOMIC VIEW OF LEASEHOLD AND FEE  
SIMPLE TENURE OF RESIDENTIAL LAND IN  
HAWAII (1964)**

Louis A. Vargha, Land Study Bureau, University of Hawaii, L.S.B. Bulletin No. 4 (Exhibit 169a)

**HOUSING COSTS IN HAWAII—Report to the Legis-**  
**lature of the State of Hawaii (1969)**

Submitted by the Interim Committee on Housing, Prepared by the Office of the Lieutenant Governor (Exhibit 177)

**AN ECONOMIC ANALYSIS OF BISHOP ESTATE  
RESIDENTIAL LEASING POLICY**

Prepared for the Bernice P. Bishop Estate by Economics Research Associates—September, 1969

*Section 1(a)(4)*

**HOUSING COSTS IN HAWAII—Report to the Legis-**  
**lature of the State of Hawaii (1969)**

Submitted by the Interim Committee on Housing, Prepared by the Office of the Lieutenant Governor (Exhibit 177)

**HAWAII'S CRISIS IN HOUSING (1970)**

**Report to the People of Hawaii**

**Office of Lieutenant Governor (Exhibit 239)**

**HOUSING IN HAWAII: PROBLEMS, NEEDS AND PLANS (12-1970)**

**Prepared for the State of Hawaii, Dept. of Planning and Economic Development by Marshall Kaplan, Gans, Kahn and Yamamoto (Exhibit 185)**

**HOUSING FOR HAWAII'S PEOPLE, TECHNICAL APPENDIX (1977)**

**Prepared for the State of Hawaii Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 206)**

**HOUSING FOR HAWAII'S PEOPLE—Summary Report (1977)**

**Prepared for the State of Hawaii Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 207)**

**HOUSING FOR HAWAII'S PEOPLE (1977)**

**Prepared for the State of Hawaii, Hawaii Housing Authority, Dept. of Planning and Economic Development, Prepared by: Daly and Associates (Exhibit 205)**

**LAND AND HOUSING ON OAHU (04-1959)**

**Prepared by Land Study Committee of The Honolulu Chamber of Commerce (Exhibit 160)**

**GOVERNOR'S STATEWIDE CONFERENCE ON HOUSING: Selected Papers From The Oahu Session (1970) Office of the Governor, Department of Planning and Economic Development, State of Hawaii (Exhibit 183)**

**THE HOUSING NEED GROUP ON OAHU HOUSING FOLLOW-UP STUDY #1 (1978)**

Prepared for the State of Hawaii, Dept. of Planning and Economic Development Hawaii Housing Authority, Dept. of Social Services and Housing, by Daly and Associates (Exhibit 208)

**GEOGRAPHIC AREA REVIEW FOR HOUSING: THE WAIANAE DISTRICT HOUSING FOLLOW UP STUDY #4 (1978)** Prepared for the State of Hawaii, Dept. of Planning and Economic Development, Hawaii Housing Authority, Dept. of Social Services and Housing, by Daly and Associates (Exhibit 209)

**COMPARATIVE ANALYSIS OF OWNERS OF MODERATELY PRICED (HHA AND NON HAA) HOMES IN TERMS OF CHARACTERISTICS AND HOUSING PREFERENCES HOUSING PREFERENCES HOUSING FOLLOW-UP STUDY #2 (1978)**

Prepared for the State of Hawaii, by Daly & Assoc. (Exhibit 211)

**HAWAII HOUSING AUTHORITY ANNUAL REPORT—July 1, 1977 to June 30, 1978 Rx for Housing: Challenge for the 80's (Exhibit 213)**

**PEOPLE HELPING PEOPLE THROUGH 20 YEARS OF STATEHOOD, Hawaii Housing Authority Annual in Report July 1, 1978—June 30, 1979 (Exhibit 214)**

**HAWAII HOUSING AUTHORITY ANNUAL REPORT, July 1, 1979—June 30, 1980 (Exhibit 215)**

**HAWAII HOUSING AUTHORITY ANNUAL REPORT, July 1, 1980—June 30, 1981 (Exhibit 216)**

*Section 1(a)(5)*

HAWAII HOUSING AUTHORITY ANNUAL REPORT, July 1, 1977 to June 30, 1978 RX for Housing: Challenge for the 80's (Exhibit 213)

PEOPLE HELPING PEOPLE THROUGH 20 YEARS OF STATEHOOD, Hawaii Housing Authority Annual in Report July 1, 1978—June 30, 1979 (Exhibit 214)

HAWAII HOUSING AUTHORITY ANNUAL REPORT, July 1, 1979—June 30, 1980 (Exhibit 215)

HAWAII HOUSING AUTHORITY ANNUAL REPORT, July 1, 1980—June 30, 1981 (Exhibit 216)

AFFORDABLE HOUSING ISSUE PAPER (1981)

Department of Planning and Economic Development, Prepared by Daly & Associates, Inc. (Exhibit 218)

HOUSING FOR HAWAII'S PEOPLE (1977)

Prepared for State of Hawaii, Hawaii Housing Authority, Dept. of Planning and Economic Development, Prepared by Daly and Associates (Exhibit 205)

HOUSING FOR HAWAII'S PEOPLE, TECHNICAL APPENDIX (1977)

Prepared for State of Hawaii Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 206)

HOUSING FOR HAWAII'S PEOPLE—Summary Report (1977)

Prepared for the State of Hawaii Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 207)

**GOVERNOR'S STATEWIDE CONFERENCE ON HOUSING—Selected Papers From The Oahu Session (1970)**

Office of the Governor, Department of Planning and Economic Development, State of Hawaii (Exhibit 183)

**HOUSING COSTS IN HAWAII—Report to the Legislature of the State of Hawaii (1969)**

Submitted by the Interim Committee on Housing, Prepared by the Office of the Lieutenant Governor (Exhibit 177)

*Section 1(a)(6)*

**HOUSING FOR HAWAII'S PEOPLE (1977)**

Prepared for State of Hawaii, Hawaii Housing Authority, Dept. of Planning and Economic Development, Prepared by: Daly and Associates (Exhibit 205)

**HOUSING FOR HAWAII'S PEOPLE, TECHNICAL APPENDIX (1977)**

Prepared for State of Hawaii Hawaii Housing Authority, Dept. of Planning and Economic Development, by Daly and Associates (Exhibit 206)

**HOUSING FOR HAWAII'S PEOPLE—Summary Report (1977)**

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**GOVERNOR'S STATEWIDE CONFERENCE ON HOUSING: (1970) Selected Papers From The Oahu Session Office of the Governor, Department of Planning and Economic Development, State of Hawaii (Exhibit 183)**

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**COMPARATIVE ANALYSIS OF OWNERS OF MODERATELY PRICES (HHA and NON HHA) HOMES IN TERM OF CHARACTERISTICS AND HOUSING PREFERENCES HOUSING PREFERENCES HOUSING FOLLOW-UP STUDY #2 (1978)**

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**HOUSING IN HAWAII: PROBLEMS, NEEDS AND PLANS (12-1970)**

Prepared for the State of Hawaii, Dept. of Planning and Economic Development by Marshall Kaplan, Gans, Kahn and Yamamoto (Exhibit 185)

*Section 1(a)(7)*

**HOUSING IN HAWAII: PROBLEMS, NEEDS AND PLANS/(12-1970)**

Prepared for the State of Hawaii, Dept. of Planning and Economic Development by Marshall Kaplan, Gans, Kahn and Yamamoto (Exhibit 185)

Excerpts of testimonies before various legislature bodies 1959-1975 in evidence as:

**Exhibit 72** Kaloaloea Neighborhood Association Statement of S.B. No. 7 (1959)

—need land for residence lots i.e. moves houses onto

—need land for new houses

Endorse S.B. No. 7, answer to problems of people unable to buy.

Forced off land by airport and industrial use.

**Exhibit 91** John Hulten Testimony

**Exhibit 93** April 10, 1959

Testimony of John Hulten

April 7, 1959

Testimony of Katsuo Miho, Chamber of Commerce

—recognized the need for making land available to as many people who can qualify to do so

**Exhibit 147** April 9, 1975

Letter from Mr. and Mrs. Stanley Keagle

—desperate straits, as lease rent has been increased by 2000% to 3000%



- cannot afford to stay
- life savings will be wiped out

**Exhibit 97**      Committee Minutes: 2/7/61  
Testimony of Frank Hustace, Former Land Commissioner

Those who might become public charges, i.e., wind up in public housing. Encourage those in public housing to move out by making it easier for them to buy housing.

**Exhibit 99**      Rev. Delwyn Rayson, 4/20/61  
Testimony  
Enclosure A (not attached)

Dr. Thomas Hitch:

“Land prices in Hawaii for residential lots are higher today than they would’ve been if it were not for the historical heritage of large estates and leaseholds.”

**Exhibit 110**    D. Richard Neill, State Committee of Christian Social Action, 4/3/63:

“A major problem for Hawaii and its future economic development and well-being is land shortage and land monopoly . . . .

Consequences are: Exorbitant land and building costs and exclusion of many people from home ownership.”

“(Land monopoly) still does to a certain extent exist in Hawaii, and . . . generally speaking, any monopolistic system tends to be bad for the health of a democratic society.”

"An important base of our 'American way of life' is individual home ownership which usually implies the land upon which the home is located, except in Hawaii."

"There is a virtual monopoly of land here in Hawaii and this bill would help alleviate it . . . This bill is both moral and democratic."

**Exhibit 110** Harry Boranian, Central Labor Council, AFL-CIO, 1963

Support the legislation because it is important to American society that home ownership be encouraged, basic foundation of a healthy and responsible community. Estates have previously been able to control price and availability of land by leasing it.

**Exhibit 111** Testimony by Clarence A. Wyatt, Jr. 1963

- artificially restricted market in Oahu homesites
- people generally want to own the land on which they build their houses
- artificial restriction pushes price up
- high cost of living, housing a big contributor to that
- large scale leasing causes economic problems
- wide dispersion of land ownership is fundamental American concept, and the concept of land ownership is reasonable

Exhibit 115 Lewis Freitas, March 20, 1967

- unreasonable rental increases
- concentration of land ownership
- unequal bargaining power and knowledge
- lessees need help

Clarence Wyatt

- fee simple ownership should be encouraged
- only way to do this is to provide by law that lessee may purchase fee
- give homeowner the choice

Aina Koa Community Association

- “squeeze” of economic coercion inherent in the practical land monopoly existing in the State
- ever-increasing inflationary pressure gravely threatens the economic well-being of these Islands
- this pressure due in substantial part to the virtual monopoly over available residential land

Exhibit 116 Testimony of Gunter R. Seckel

4/22/66 (671)

- land in Hawaii is essentially under monopoly control
- large landowners have bled the public for too long and are the primary cause of Hawaii's high cost of living

Exhibit 120 June 13, 1967

Letter from Lewis Freitas to Governor urging passage of Land Reform Bill

—lessees have inadequate bargaining power  
and no effective legal protection currently

May 23, 1967

G.R. Conradt

—49 other states have fee simple land owned  
by homeowners who can buy that land.

Why not Hawaii?

—encourage fee ownership

**Exhibit 138 Kalihi-Palama Neighborhood Council**

**February 10, 1975**

—in favor of legislation allowing lessee to  
purchase fee interest

—those who make land productive should  
have the right to own it

—present land system is monopolistic and  
illegal

—land monopoly, i.e., lack of fee simple land  
has enormous effect on cost of living

—should allow both commercial and residen-  
tial lessees to purchase land

—eventually, without Maryland land law,  
we'll all become economic serfs to a few  
large landowners

—monopolise and restraints of trade are  
dangerous

—land a vital commodity

—land is the key to affordable housing, not  
the cost of houses themselves

**Exhibit 142 May 15, 1975**

Letter by Ralph Hubbard (Alii Shores) urging Governor to sign S.B. No. 1200

—essential relief to many homeowners in Hawaii now at mercy of large landowners  
—many homeowners wish to feel true ownership of their homes and the land on which they stand, without fear of future loss

**May 19, 1975**

Letter by Crown Terrace Community Association

—S.B. No. 1200 will help thousands of Hawaii residents to acquire ownership and provide some assurance that they will be able to keep their homes in the future

**Exhibit 143 March 27, 1975**

Testimony of George Connick  
prepared in the Research and Economic Analysis Division, headed by Dr. Richard Y.P. Joun, Robert C. Schmitt, State Statistician, with the assistance of Lynn Y.S. Zane, Research Statistician (Exhibit 202)

**SEE COMPANION CASE**

No. 83-236

Office - Supreme Court, U.S.

FILED

MAR 10 1984

ALEXANDER L. STEVAS.

CLERK

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of  
the Kamehameha Schools/Bishop Estate,  
*Appellees.*

## APPELLANTS' REPLY BRIEF

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No. 83-236

In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);  
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA  
COMMUNITY ASSOCIATION; HAHAIONE VALLEY  
COMMUNITY ASSOCIATION,  
*Appellants,*

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,  
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of  
the Kamehameha Schools/Bishop Estate,  
*Appellees.*

**APPELLANTS' REPLY BRIEF**

**SUMMARY OF ARGUMENT**

Primarily we support the argument of appellants in Nos. 83-141 and 83-283 that the Hawaii Land Reform Act meets the "minimum rationality" test for federal review of state legislation. We here point out that, should a contrary view be taken, an evidentiary hearing is required before the statute can be held unconstitutional. In that case the special circumstances exist for abstention in eminent domain cases. We also answer appellees' new Fourteenth Amendment argument and show that appellees have not really come to grips with the cases holding that a state has broad powers to deal with recognized economic ills.

## ARGUMENT

### I

#### APPELLANTS FAILED TO MEET THE ARGUMENT THAT THE COURT OF APPEALS ERRED IN RELY- ING ON "EVIDENCE" AND IN REAPPRAISING THE FINDINGS OF THE HAWAII STATE LEGISLATURE

In our Brief on the Merits we pointed out that, in reappraising the findings of the Hawaii State Legislature, the pivotal concurring opinion below relied upon certain "evidence of record" and looked to findings of fact in a related case, 702 F.2d at 805, 806; Portlock A-38, 41.<sup>1</sup> Appellees' brief also relies on evidence to support its arguments. For example, appellees dispute what evidence was considered by the Hawaii Legislature, BR 7-8, n.22. Appellees make controversial assertions as to the reason for the leasehold system in Hawaii, BR 5-6. Appellees argue that the legislative justifications are nothing more than "rationalizations," BR 24; they assert that the legislative findings are no more than "creative rhetoric," BR 58; they assert that the legislative finding that the transfers of title will combat inflation is "baseless," BR 71; they assert that the statute is not aimed at eliminating concentration, BR 73; they make evidentiary assertions as to the effect of zoning in Hawaii, BR 74-75.<sup>2</sup> To support their Fourteenth Amendment due process argument they rely expressly on evidence "introduced below," BR 84, n.201. Clearly the Briefs of Amici Curiae, The Office of Hawaii Affairs and Queen Liliokalani et al., rely almost entirely on matters not of record.

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<sup>1</sup>References to appendices are: Separate Appendix to Jurisdictional Statement in No. 83-236, Portlock A-.....; Joint Appendix in Nos. 83-141, 83-283, JA-.....

<sup>2</sup>References BR are to Brief for Appellees unless otherwise noted.

The problem with appellees' position is that the District Court did not permit plaintiffs-appellees at the trial to introduce evidence on the question of whether the taking was for a public use, 483 F.Supp. 65, 70; Portlock A-71, 72, 81-82. The court found the statute facially valid on the intervenors' motion for summary judgment, JA 93. Appellees demanded a trial in the District Court and argued in the Court of Appeals that it was error for the trial court to deny them an evidentiary hearing, BR 17. While we adopted the position of appellants in Nos. 83-141 and 83-283 that a federal court can review the instant statute only for minimum rationality, we pointed out that the legislative findings on public use could be rejected only after an evidentiary hearing, Portlock BR 13. Since appellees did not address this latter issue directly in their brief we assume that the cases cited by appellees on the propriety of invalidating condemnation statutes are those applicable on this point, Appellees' BR 63-64, n.162. Of these cases six held that there was public use.<sup>3</sup> One case involved only the question of removal jurisdiction of a condemnation action.<sup>4</sup> The rest of the cases relied on were not eminent domain cases.<sup>5</sup> Thus, appellees can cite no decision of this Court

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<sup>3</sup>*Shoemaker v. United States*, 147 U.S. 282 (1893) (facially valid); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598 (1908) (facially valid); *Sears v. City of Akron*, 246 U.S. 242 (1918) (facially valid); *Rindge Co. v. Los Angeles County*, 202, 700 (1923) (facially valid); *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946).

<sup>4</sup>*Madisonville Traction Co. v. St. Bernard Mtn. Co.*, 196 U.S. 239 (1905).

<sup>5</sup>*Missouri-Pacific R.R. Co. v. Nebraska*, 164 U.S. 403 (1896) held unconstitutional a state statute requiring a railroad to permit an elevator to be constructed on its land but only after a complete admin-



that has overturned a condemnation statute on the grounds of lack of public use or public purpose without an evidentiary hearing. "No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws." *United States ex rel TVA v. Welch*, 327 U.S. 546, 552 (1946) (quoting *Hairston v. Danville & Western Railway*, 208 U.S. 598, 607 (1908)). Appellees' brief refers to no case holding a condemnation statute unconstitutional on its face for failure of public use or public purpose, the approach adopted by the majority opinion in the court below and urged by appellees.<sup>9</sup>

Therefore, if the Court of Appeals did not affirm the judgment, it should have remanded for a hearing or with directions to abstain pending resolution in Hawaii courts.

istrative hearing. *Block v. Hirsch*, 256 U.S. 135 (1921) upheld an act of Congress which gave tenants the right to hold over during an emergency period based upon the sufficiency of the Congressional findings. *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923) upheld the constitutionality of an act creating a tunnel improvement district after trial proceedings appraising the benefits to plaintiff's real property. *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55 (1937) affirmed an injunction enjoining enforcement of prorate orders of the Texas Railroad Commission but only after an extensive record at a trial before a three judge court. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930) was an eminent domain case, but it did not involve the validity of the statute; it affirmed an injunction restraining the condemnation of plaintiff's property on the ground that it was "excess condemnation" as not being needed for street widening but only after an evidentiary hearing in the District Court.

<sup>9</sup>Cases cited elsewhere by appellants are not in point: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) held that permanent physical occupation is a taking but did not invalidate the statute. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) held a housing ordinance invalid based on undisputed factual representations. 431 U.S. 506, n.2.

## II

**APPELLEES HAVE FAILED TO MEET OUR ARGUMENT ON ABSTENTION**

We pointed out that at the time of the decision of the Court of Appeals, the Hawaii Supreme Court had already determined that the validity under state and federal constitutions of the instant legislation could be determined only after an evidentiary hearing and that a trial pursuant to these decisions, but in another case which appellees herein were a party, was in progress. *Hawaii Housing Authority v. Castle*, 65 Hawaii 465, 653 P.2d 781 (1982), Portlock A-166; *Hawaii Housing Authority v. Brown*, Civ. No. 8489 (Hawaii S.Ct. 1982) Portlock A-163; Portlock BR Ex. 1. We also pointed out that there was a conflict between the Ninth Circuit and the Seventh Circuit as to abstention in eminent domain and land use cases, and that this Court had not addressed the issue. Portlock BR 16.<sup>7</sup> We also pointed out that there were special circumstances justifying abstention, such as were found in the concurring opinion in *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). *Kaiser Steel* is important because there the state proceedings were not even commenced until after the initial decision of the Court of Appeals. In sum, we argued that a hearing being necessary before the statute could be held unconstitutional, the Court of Appeals should have reversed and remanded. Moreover, since a trial was already in progress in a state court on precisely these issues (Portlock BR Ex. 1) the District Court should have been ordered to abstain.

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<sup>7</sup>See, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *County of Alleghany v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Ahrensfield v. Stephens*, 528 F.2d 193 (7th Cir. 1975).

Appellees did not consider the special application of abstention to eminent domain cases, nor did they deny that the special circumstances for abstention as found in *Kaiser Steel* exist here. Instead, they attempted to distinguish *Kaiser Steel* on the ground that it involved public purpose under state law. BR 27, n.76. Appellees' distinction is correct but it is without a difference because this Court has repeatedly held that what is a public purpose for federal constitutional purposes depends upon facts with which the people and courts of the state are most familiar. *Fallbrook Irrigation Distict v. Bradley*, 164 U.S. 112, 115 (1896); *Clark v. Nash*, 198 U.S. 361, 369 (1905); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 547 (1946).

Next appellees contended that the abstention point had been waived, although it is not clear that they even claimed that the waiver applied to the lessee appellants. In their waiver argument they make only a footnote reference to the lessee appellants. BR 31, n.84. Their principal argument seems to be that the Housing Authority raised the argument for the first time in this Court, BR 30-34.\* In the first place, the waiver point has little merit because all three judges in the Court of Appeals actually considered the question of abstention on the merits. Appellees state that, "... Portlock only claimed that *Younger* was applicable in a supplemental post-oral argument memorandum. At no time did Portlock claim that any other abstention

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\*Appellees' waiver cases, BR 30, n.83, all involve situations where abstention was either raised for the first time, or waived, in the Supreme Court. *Kolender v. Lawson*, 103 S.Ct. 1855, 1857 n.3 (1983); *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977); *Sosna v. Iowa*, 419 U.S. 393, 398-397 n.3 (1975).

doctrine was apposite", BR 31, n.84. This is not correct; the brief referred to specifically cites the eminent domain cases, *Ahrensfeld, Louisiana Power & Light Co.* and *Clark v. Nash*, as well as *Younger*, and other cases. J.A. 151 et seq.

Thus, because the Court of Appeals believed that under its view of the law the public purpose of the Hawaii Land Reform Act could be questioned, a trial on that issue was required. Because such a trial was already in progress in the state court, there were special circumstances requiring abstention.

### III

#### **CONDEMNATION WAS A REASONABLE WAY OF REMEDYING CONCENTRATION OF FEE SIMPLE OWNERSHIP OF RESIDENTIAL LAND IN HAWAII**

It must be taken as a given that there is a concentration of fee simple ownership of residential land in the hands of a small number of landowners and that the landowners have abused their economic power; the legislature has so found, Portlock A-115-117, 133-135. Only after a trial could a court find otherwise.\*

The question therefore is what reasonable steps could the legislature take to remedy this situation.<sup>10</sup> We pointed out that this Court has upheld legislative and congressional

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\*The trial evidence supports the legislative findings, Portlock BR, Ex. A, 31, 65-67, 89, 91-92.

<sup>10</sup>We do not say that the legislature's only purpose was to remedy concentration; we are, for purposes of argument, using this analysis to demonstrate only one of many grounds supporting the constitutionality of the statute.

action requiring divestiture to eliminate similar economic evils. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686 (1946). We read appellees' brief to agree with our interpretation of *Exxon*, BR 73-74, n. 185. They protest, however, that the Hawaii Land Reform Act is not an anti-monopoly or anti-oligopoly act and that the legislature could not constitutionally declare the existence of a monopoly by statutory fiat. BR 73-74, n.185. But we do not make either of those claims here. The statute of Maryland involved in *Exxon* was not an anti-monopoly or anti-oligopoly statute, Art. 56 Annotated Code of Maryland § 157E, cited in *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102, 1105-1106 (1977). Likewise, we find nothing in the operative provisions of the Public Utility Holding Company Act which relates to either oligopoly or monopoly, 327 U.S. 792, n.7.

The last distinction appellees make is that a taking was not involved in either *Exxon* or *North American*, BR 73 n.185. The "taking" distinction raised by appellees brings us directly to the holding we claim for *Berman v. Parker*, 348 U.S. 26 (1954). It is that if the object of Hawaii Land Reform Act was authorized by the police power, the same object could be realized by the exercise of eminent domain. Appellants contest our reliance on the holding of *Berman* on two grounds: First, that the holding is not as broad as we state it is, and second, that the Court should reexamine *Berman*, BR 76-78. Appellants are wrong on both counts.

That *Berman* holds that exercise of eminent domain can be justified under the police power is evident from reading the lower court decision in *Berman*, *Schneider v. District*

of *Columbia*, 117 F.Supp. 705 (D.C. 1953), *aff'd sub nom. Berman v. Parker*, 348 U.S. 26 (1954). One of the issues was stated by the District Court as follows: "Can the Government seize title to land from which a slum has been or could be cleared, and sell it to a private person for private uses?" 117 F.Supp. 716. The court answered this affirmatively by relying on the power of eminent domain. Judge Prettyman stated for the three judge court:

Moreover, the traditional concept of use as the keystone of eminent domain has been enlarged in modern thought and cases. We find it described as public purpose. The variation in the term from "use" to "purpose" indicates a progression in thought. The idea is that the taking itself, as distinguished from the subsequent use of the property, may be required in the public interest. The Supreme Court has not gone far in that direction, but we think we see it indicated in the *Brown* and *T. V. A.* cases, which we have discussed. We so hold.

117 F.Supp. 716."

Since the Supreme Court determined to affirm this holding of the District Court on the grounds of police power rather than on eminent domain, one can only conclude that the opinion in *Berman* is a square holding that the police power can be used to sustain the exercise of the power of eminent domain.

Next appellants and amicus curiae, Pacific Legal Foundation, argue that all kinds of untoward events will occur if *Berman* continues to be the law, BR 58 et seq. The simple answer is that although the decision in *Berman* is 30 years

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<sup>11</sup>A similar holding was reached in *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d (1st Cir.) *cert. denied*, 329 U.S. 772 (1946).



old, none of the evils foreseen by appellants has in fact occurred. In any event, it should not be reexamined without an evidentiary record.

Finally, we cannot resist pointing out that the Hawaii legislature chose to exercise eminent domain instead of a more drastic remedy to accommodate the Bishop Estate's tax problems, Portlock BR, Ex. 1, 46-47.

#### IV

### **APPELLEES' FOURTEENTH AMENDMENT DUE PROCESS ARGUMENT RELIES ON EVIDENCE TO MISCONSTRUE THE STATUTE**

Appellees argue that the Hawaii Land Reform Act violates both substantive and procedural due process requirements of the Fourteenth Amendment, BR 82-85.<sup>12</sup> As to substantive due process the holdings of *Exxon* and *Berman* apply. The cases cited by appellees do not detract from *Exxon's* holding that a state has power to deal with the problems of concentration of economic power.<sup>13</sup> Appellees argue, however, that the Act's provisions "have no

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<sup>12</sup>They appear to have abandoned their argument that they were entitled to a trial on the merits.

<sup>13</sup>*Moore v. City of East Cleveland*, 431 U.S. 494 (1977) is distinguished *supra*. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) held that plaintiff's property was unconstitutionally zoned residential instead of commercial based upon a master's report resulting from a view and a hearing. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) held invalid as a denial of equal protection a provision of the Food Stamp Act of 1964 excluding households containing individuals unrelated to other members for the reason that the provision was unrelated to the stimulation of the purchase of farm surpluses. *Zobel v. Williams*, 457 U.S. 55 (1982) held that Alaska's plan to distribute its natural resource income on the basis of length of residence was an invalid denial of equal protection. *Logan v. Zimmerman Brush Co.*, 455



rational connection with . . . eliminating a concentration of land ownership," BR 83. Because the Act expressly provides for the condemnation and acquisition of lands held in concentrated ownership, appellees' argument is either an evidentiary argument or a dispute as to how the statute should be interpreted—or a logomachy. In any event this Court should not resolve this controversy against appellants until Hawaii construes the statute.

Appellees next argue that the Hawaii Land Reform Act delegates standardless authority over eminent domain to private parties who have a pecuniary interest in the property. The statute does not so read; it clearly requires the Hawaii Housing Authority in each case to find, *inter alia*, after notice and hearing, that the acquisition will effectuate the public purposes of the Act [i.e., elimination of concentration]. Haw. Rev. Stat. § 516-22, Portlock A 140-141. The Housing Authority, and only the Housing Authority, makes these findings; it is not an appellate body. We do not find anything in the opinions below construing the statute other than as above; see, Portlock BR, Ex. 1, 99-101. Further it is not even necessary that the lessee of a particular lot apply to the Housing Authority for purchase in order for that lot to be designated, Portlock BR, Ex. 1, 99. Thus, the cases relied on by Appellants are not in point because in none of those cases did an administrative body make the initial findings after notice and hearing.<sup>14</sup> Rather the

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U.S. 422 (1982) held that an Illinois statute providing for dismissal of claims not timely scheduled for hearing by a commission violated equal protection and due process.

<sup>14</sup>*Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) is not in point because under the Hawaii statute the lessees do not make any findings which are then appealed.

Hawaii Housing Authority's function is very similar to that performed by the Securities & Exchange Commission under the Public Utility Holding Company Act. See, *North American Co. v. Securities & Exchange Com'n*, 327 U.S. 686, 792, n.7 (1946).

Recognizing this, appellants assert that "... the follow-up hearing is simply a formality, as the evidence introduced below demonstrates (JA 162-165)" BR 84, n.201. This is not only another instance of appellants' urging a facial construction while relying on evidence; it is also wrong as a mere reading of appellants' reference will establish.

### CONCLUSION

We respectfully submit that if this Court holds that the Hawaii Land Reform Act does not meet the "minimum rationality" test for review, the matter be remanded with directions to stay proceedings pending termination of the parallel action in the Hawaii state court.

Respectfully submitted,

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Inc.; West Marina  
Community Association;  
and Hahaione Valley  
Community Association,  
Appellants*

No. 83-236-AFX  
Status: GRANTED

Title: Portlock Community Association (Maunaloa Beach), et al., Appellants  
v.  
Frank E. Midkiff, et al.

Docketed:  
August 10, 1983

Court: United States Court of Appeals  
for the Ninth Circuit

Vide:  
83-141  
83-283

Counsel for appellant: Archer, Richard J.

Counsel for appellee: Prettyman Jr., E. Barrett, Case, James H., Tribe, Laurence H.

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1983	G	Statement as to jurisdiction filed.
2	Aug 10 1983		Appendix of appellant Portlock Com. Assn., et al. filed.
4	Aug 26 1983		Order extending time to file response to jurisdictional statement until October 3, 1983.
5	Oct 3 1983		Motion of appellees Frank E. Midkiff, et al. to affirm filed. VIDED.
6	Oct 5 1983		DISTRIBUTED. October 28, 1983
7	Oct 11 1983		waiver of right of appellees Kahala Community Association to respond filed.
8	Oct 31 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 83-141 and 83-283 and a total of one hour is allotted for oral argument. Justice Marshall OUT. *****
9	Dec 15 1983		Brief of appellants Portlock Com. Assn., et al. filed.
10	Dec 22 1983		Application for leave to file appellees' joint brief on the merits in excess of page limitations, and order granting same not to exceed 100 pages, by Rehnquist, J., Dec. 23, 1983.
11	Dec 22 1983		Record filed.
12	Jan 16 1984		Certified original record & C.A. proceedings received. (Box).
13	Jan 16 1984		Brief of appellees Frank E. Midkiff, et al. filed. VIDED.
14	Jan 23 1984		Brief amicus curiae of Queen Liliuokalani Trust, et al. filed. VIDED.
15	Jan 23 1984		Brief amicus curiae of Office of Hawaiian Affairs filed. VIDED.
16	Jan 23 1984		Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
17	Jan 23 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (4th case) This case is consolidated with Nos. 83-141 & 283. (1 hr.)
18	Feb 14 1984		CIRCULATED.
19	Feb 27 1984		Motion of appellants in No. 83-236 for divided argument filed.
20	Mar 7 1984	D	Reply brief of appellants Portlock Com. Assn., et al. filed.
21	Mar 10 1984	X	Motion of appellants in No. 83-236 for divided argument DENIED. Justice Marshall OUT.
22	Mar 19 1984		ARGUED.
23	Mar 26 1984		